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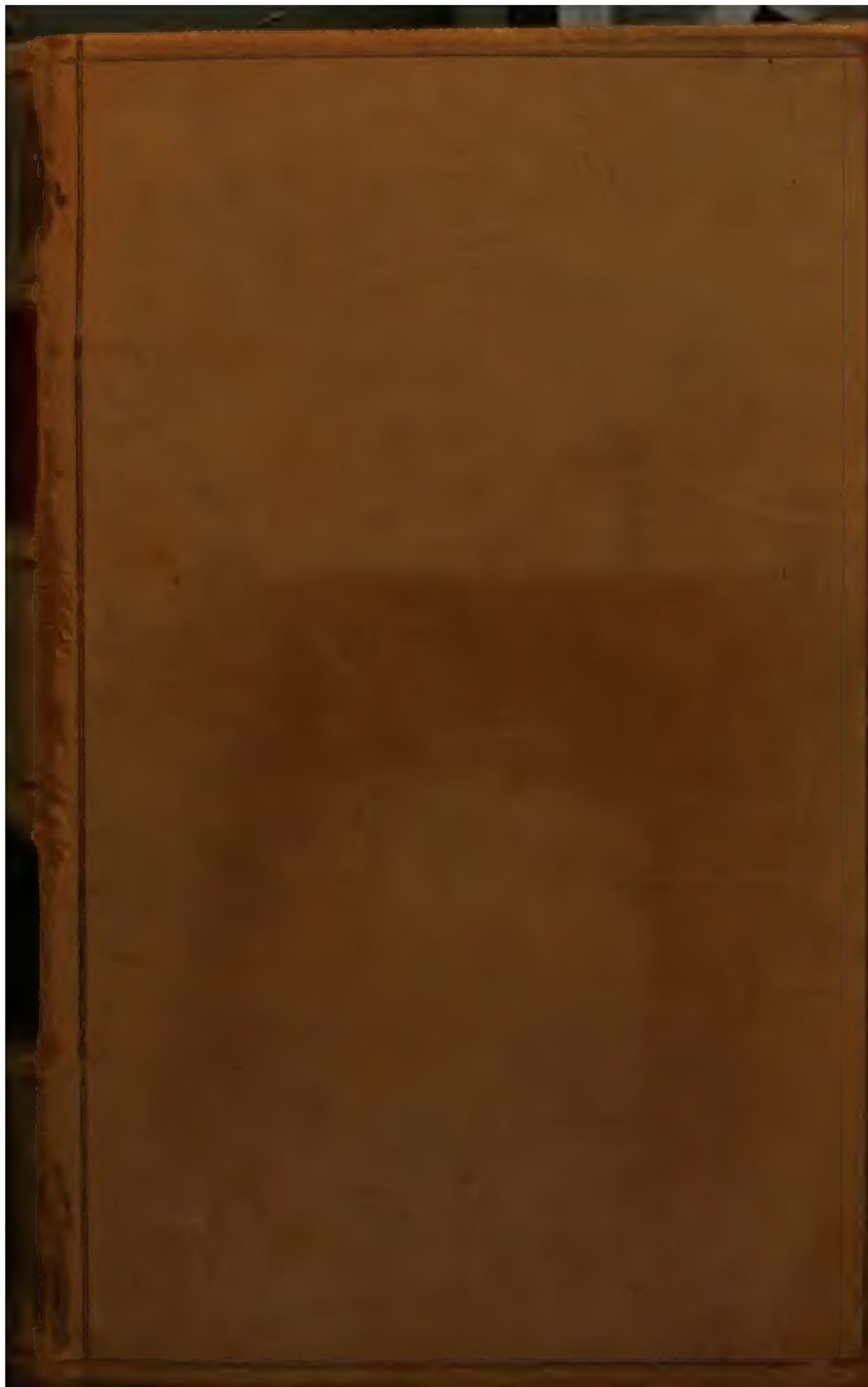
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v. 2

A TREATISE
ON THE
LAW OF WILLS,

INCLUDING THEIR
EXECUTION, REVOCATION, ETC.;

ALSO A
FULL DISCUSSION OF THE RULES AND PRINCIPLES OF THEIR
CONSTRUCTION, TOGETHER WITH A CONSIDERATION OF
THOSE RULES OF THE LAW OF REAL PROPERTY
AND OF THE DOCTRINES OF EQUITY WHICH
ARE MOST FREQUENTLY APPLICABLE
TO TESTAMENTARY DISPOSI-
TIONS OF PROPERTY,

WITH
FULL REFERENCES TO THE LATEST AMERICAN
AND ENGLISH DECISIONS.

BY
H. C. UNDERHILL, LL. B.,
OF THE NEW YORK BAR,
AUTHOR OF A "TREATISE ON THE LAW OF EVIDENCE," AND A
"TREATISE ON THE LAW OF CRIMINAL EVIDENCE."

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THE LAW OF WILLS.

THE LAW OF WILLS.

CHAPTER XXIV.

THE CREATION OF TENANCY IN COMMON AND JOINT TENANCY BY WILL.

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§ 532. Devises in joint tenancy and tenancy in common distinguished.— Before proceeding to consider what language in a will will create a joint tenancy and what will create a tenancy in common, it is necessary to distinguish these two species of tenure from one another. “Tenants in common,” says Chancellor Kent, “are those who enjoy unity of possession; while they may hold by separate and distinct titles, or by one title derived at the same time under the same will or descent. Each has an entire and distinct interest which he may convey as if seized of the same in severalty.”¹ But of the several characteristics of tenure, namely, possession, interest, title, and time; in

¹ 4 Kent, pp. 367, 371; 2 Black. Com., p. 191.

respect to tenancy in common, there is a unity among the tenants of possession alone, with a unity of title in case of a devise, so far as the beginning of the tenancy is concerned. In the case of a tenancy in common, created otherwise than by will, one tenant may hold by descent, as from A., his father, and another may hold by purchase from A., or both may hold from different grantors. Again, in the case of a tenancy in common under a will, one tenant may hold for life and another in fee-simple or fee-tail.¹ Neither one of the tenants can say of any particular portion of the estate, "this is mine;" for the possession of all is the possession of each.

Neither can one bring ejectment against the others, nor dis-seize the others. At common law, partition among tenants in common could not be compelled.² It might be voluntarily made by the execution of mutual deeds of conveyance; but at the present time, by statute, partition may be had by compulsory proceedings brought in a court of competent jurisdiction. As there is no survivorship in tenancy in common, any tenant may dispose of his interest either by deed or will.³ Tenancies in common may be created either by descent or by purchase. Joint tenancy is invariably the result of the act of the parties themselves; never of the application of any principle of law. The joint tenants enjoy the four unities, as they are called; that is, unity of interest, title, time and possession.⁴ In other words, they have one and the same interest, accruing in one and the same manner, commencing at one and the same time, and held by one and the same undivided possession. Upon the death of one tenant his share does not go to his heirs or next of kin, nor can he dispose of it by will,⁵ but to the surviving joint tenants. In this respect it will be seen the estate differs widely from tenancy in common.

§ 533. The creation of joint tenancy at common law.—At the common law it is a well-settled rule that land devised to two or more persons simply, without any exclusive, restrictive or explanatory language by which *they are made tenants in*

¹ 2 Black. Com., p. 191.

⁴ 2 Black. Com., p. 189.

² By statute 81 Hen. VIII, c. 1, and 32 Hen. VIII, c. 32, it may.

⁵ Wilkins v. Young, 144 Ind. 1, 41 N. E. R. 68.

³ Simmons v. Spratt, 26 Fla. 449, 8 S. Rep. 123.

common, shall vest in them as joint tenants, whether to them individually or as members of a class.¹ Thus, where a devise is to A. and B. and their heirs, or to A. and B. for their lives, and after their death to their heirs, A. and B. take as joint tenants, and, on the death of either, the property goes to the other for life; but not until the death of both does it go to the heirs. The tendency of the earlier authorities, for feudal reasons, was to favor the creation of joint tenancies,² and the same rule which was applied to a devise was applied to gifts of chattels to several persons *simpliciter*,³ or to a money legacy. But an exception to this rule was always made in the case of a devise to two persons who are husband and wife, who were regarded by the law not as distinct persons, but as one, and who hence took as tenants by the entirety.⁴

§ 534. **Language creating tenancy in common at common law.**—Independently of statute, it usually requires clear expressions by the testator to show that he intended that devisees shall take as tenants in common and not as joint tenants. If, therefore, he inserts words of severance, or indicates an intention to divide equally, or to partition, or uses language which expressly or by necessary implication shows that he intends a tenancy in common, the presumption in favor of joint tenancy would be removed. Thus, where the devise was given, equally to be divided,⁵ or in *equal moieties* to A. and B., with remainder over,⁶ a money legacy was given to A. and B., *each so much*,⁷ or a sum is to be divided “*unto and among*” several persons,⁸ or “*between*” two or more,⁹ or to be paid

¹ *Parsons v. Boyd*, 20 Ala. (1852), 112; *Phelps v. Jepson*, 1 Root (Conn., 1789), 48; *Hannan v. Towers*, 3 Har. & J. (Md., 1810), 147, 149; *Webster v. Vandeventer*, 6 Gray (Mass.), 428, 431; *Hardenbergh v. Hardenbergh*, 10 N. J. L. (1828), 42; *Purdy v. Hayt*, 92 N. Y. (1883), 446, 453; *Lorillard v. Coster*, 5 Paige (N. Y.), 228, 14 Wend. 342; *White v. Sayre*, 2 Ohio (1825), 103, 110; *Miles v. Fisher*, 10 Ohio (1840), 1; *Gilbert v. Richards*, 7 Vt. 208; *Dott v. Wilson*, 1 Bay (S. C., 1795), 457; 2 Bl. Com., pp. 180, 189.

² Salk. 392; Co. Litt., § 298.

³ *Shore v. Billingsley*, 1 Vern. 482; *Willing v. Baine*, 8 P. W. 113, 114.

⁴ *Freestone v. Parrot*, 5 T. R. 652; *Back v. Andrew*, 2 Vern. 120; *Earle v. Wood*, 8 Cush. 430, 445; *Simpson v. Batterman*, 5 Cush. 153, 156; *Tillinghast v. Cook*, 9 Met. 143, 147.

⁵ 2 Black. Com., p. 192.

⁶ *Harrison v. Foreman*, 5 Ves. 206, 209.

⁷ *Eales v. Earl of Cardigan*, 9 Sim. 384.

⁸ *Campbell v. Campbell*, 4 Bro. C. C. 15; *Richardson v. Richardson*, 14 Sim. 526, 528.

⁹ *Lashbrook v. Cook*, 2 Mer. 70; *Attorney-General v. Fletcher*, L. R. 13 Eq. 128, 130.

“equally,”¹ or to several persons respectively,² or to be paid to each of the respective heirs of the persons mentioned,³ a tenancy in common was created. And modern cases decided since the middle of the eighteenth century, even in the absence of statute, have favored the creation of a tenancy in common rather than a joint tenancy.

§ 535. **American doctrine — Tenancy in common implied from words of division or partition.**—In America the courts, long prior to the adoption of statutes abolishing survivorship, pronounced against estates in joint tenancy. The policy of the common law by which joint tenancy was favored, in the absence of express language creating tenancy in common, was based upon the fact that the division of the tenure by multiplying those who rendered feudal services, and dividing the rents and services, tended to weaken the efficacy of the feudal system.⁴ But when feudal tenures were abolished, the reason for the existence of survivorship ceased. And Lord Hardwicke remarked in *Hawes v. Hawes*, 1 Wils. 165, that, in his opinion, even the courts of law no longer favored joint tenancy, and so far as the policy of equity was concerned it had never been favored. As early as the time of Chancellor Kent,⁵ statutes had been passed in many of the states of the American Union by which estates in joint tenancy were abolished unless expressly created by deed or will. In Connecticut the odious and unjust doctrine of survivorship, as it was termed, had been repudiated before this.⁶ And generally it may be safely said that while an estate in joint tenancy may be created by express language in a will, yet the creation of such estates is at present discouraged by the law.⁷ Irrespective of statute it is the modern rule of construction that any language in a will, showing an intention on the part of the testator that there shall be *a division in equal shares*, will create a tenancy in common. Thus, where the testator gave land *equally to be divided*,⁸ or to

¹ *Walker v. Dewing*, 8 Pick. (Mass.) 519.

² *Torrent v. Frampton*, Styles, 434; *Folkes v. Western*, 9 Ves. 456, 460.

³ *Gordon v. Atkinson*, 1 De Gex & Smale, 478.

⁴ *Fisher v. Wigg*, 1 Salk. 391, 392.

⁵ 4 Kent, Com. 357; 1 Perry, Trusts, § 136.

⁶ *Phelps v. Jepson*, 1 Root (Conn.), 45; *Whittelsey v. Fuller*, 11 Conn. 340.

⁷ *Simons v. McLain*, 51 Kan. 153, 160.

⁸ *Griswold v. Johnson*, 5 Conn. (1824), 363; *West v. Rassman*, 34 N. E. R. 991, 135 Ind. 278, 293; *Bowen v. Swander*, 121 Ind. 164, 170, 22 N. E. R. 725; *Briscoe v. McKee*, 2 J. J. Marsh. (25 Ky., 1829), 370; *Simmons v. Spratt*,

be divided "*share and share alike*,"¹ or where land is to be distributed *as a common stock*,² a tenancy in common is created. In England it has been held that the addition of words of survivorship to a gift to several as tenants in common does not of necessity make it a joint tenancy. Thus, a gift to several "*share and share alike*," but if one die then to the survivor, was held to mean death during the life-time of the testator.³ An annuity given to A. and B., each so much, does not become a joint tenancy because it is stated to be for their lives and the life of the survivor.⁴

§ 536. When two or more devisees of an estate tail are tenants in common.—The rule by which a devise to A. and B. in fee creates in them a joint tenancy in the absence of statute does not apply to a devise to A. and B. and the heirs of their bodies, where A. and B. are not husband and wife and cannot become such, either because they are of the same sex, or, being of opposite sexes, because they are within the prohibited degrees. In such case they are joint tenants for life, but tenants in common by necessity in respect to the estate tail.⁵

§ 537. Tenancy in common by a devise of the same land to two or more in fee.—At common law a devise in one portion

26 Fla. 449 (1890), 8 S. R. 123; *Spencer v. Chick*, 76 Me. 347, 349; *In re Brown*, 86 Me. 572, 578; *Stetson v. Eastman*, 84 Me. 369; *Partridge v. Colgate*, 3 Harr. & McH. (Md., 1793), 339; *Walker v. Dewing*, 8 Pick. (25 Mass.) 519, 520; *Bigelow v. Clapp*, 166 Mass. 88, 91; *Emerson v. Cutler*, 14 Pick. (31 Mass.) 108; *Farmer v. Kimball*, 46 N. H. 435; *Budd v. Haines*, 29 Atl. R. 170, 52 N. J. Eq. 488, 489; *Hill v. Spruill*, 3 Jones' Eq. (56 N. C., 1857), 490; *Culp v. Lee*, 14 S. E. R. 74 (1891), 109 N. C. 675; *McMaster v. McMaster*, 10 Gratt. (Va., 1853), 275; *Warner v. Hone*, 1 Eq. Cas. Abr. 290, pl. 10.

¹ *Watts v. Clardy*, 2 Fla. (1848), 369; *Lombard v. Boyden*, 5 Allen, 249, 251; *Holbrook v. Finny*, 4 Mass. (1808), 567; *Nye v. Drake*, 9 Pick. (Mass.) 37; *Midgett v. Midgett*, 117 N. C. 8, 10, 23 S. E. R. 37; *Culp v. Lee*, 109 N. C. 675, 677; *Hamilton v. Boyle*, 1 Brev. (S. C., 1804), 414, 419; *Bunch v. Hurst*, 3 Des. (S. C., 1811),

Eq. 288; *Witmer v. Ebersole*, 5 Pa. St. (1846), 458; *Irwin v. Dunwoody*, 13 S. & R. (Pa.) 61; *Heath v. Heath*, 2 Atk. 122; *Perry v. Woods*, 3 Ves. 204, 208, n.; *Barker v. Giles* (1725), 2 P. W. 280, 283.

² *Dickson v. Dickson*, 70 N. C. 487.

³ *Bindon v. Earl of Suffolk*, 1 P. W. 96, 97. And so of a gift to A. and B. with a limitation to the survivor in case either dies without issue. *Ryves v. Ryves*, L. R. 11 Eq. 539, 541; *Perry v. Woods*, 3 Ves. 204; *Ashford v. Haines*, 21 L. J. Ch. 496; *ante*, § 342.

⁴ *Jones v. Randall*, 1 J. & W. 100; *Eales v. Earl of Cardigan*, 9 Sim. 384. A direction that C. should participate in a gift of the residue to A. and B. makes them all tenants in common, not joint tenants. *Robertson v. Fraser*, L. R. 6 Ch. 696.

⁵ *Co. Litt.* 184a; *Litt.* 283; 2 Black. Com., p. 191; *Huntley's Case*, *Dyer*, 326a.

of a will of a fee in land to A., and in a subsequent clause a devise of the fee in the same land to B., gave A. and B. the land as joint tenants in fee, for in no other way could these two clauses be reconciled. But by force of the existing American statutes such a disposition of the fee-simple of land to two different persons in separate clauses of a will gives them the land as tenants in common, each taking an undivided half.¹

§ 538. Gifts in remainder to classes as joint tenants.—The general rule of the common law, that a gift to several makes them joint tenants, is applicable to gifts to classes as well as to gifts to individuals.² Thus, where the matter is not regulated by statute, and where there are no words indicating a severance among the devisees, in the case of a bequest to children as a class in remainder, or an executory devise after a life estate, the devisees will take as joint tenants.³ This is the rule irrespective of the fact that the interests of the children vest in them at different periods, while at common law the interests of joint tenants must vest in them at one and the same time.⁴ For in the case of a future estate devised to children as a class after a life estate, it is a well-known rule that the property will vest in such of the children as are living at the death of the testator, and that after-born children born during the existence of the life estate will, on their birth, acquire a vested right to share with the others in the remainder.⁵ And where a provision of a future estate for children as a class is for those only who survive the life tenant, those who predecease him are excluded. At common law the limitation of a future estate on such conditions would have made all the children tenants in common.⁶ But under the rules of equity such a testamentary disposition of property was placed upon the basis of a conveyance in trust. The presumed intent of the creator of a trust and of the testator to create a joint tenancy was permitted to overcome the rule of the common law. Thus, where land was devised to A. for life, remainder to B. and to her children and

¹ Day v. Wallace, 144 Ill. 256, 33 N. E. R. 185. The cases are fully cited *ante*, § 360.

² Kuhn v. Webster, 12 Gray, 316; Culp v. Lee, 14 S. E. R. 74, 109 N. C. 675; West v. Rassman, 135 Ind. 278, 84 N. E. R. 991; Kean v. Roe, 2 Har.

(Del., 1836), 103; Withy v. Mangles, 4 Beav. 358; Wood v. Wood, 8 Hare, 65; Gregory v. Smith, 9 Hare, 708.

³ *Post*, § 553.

⁴ 2 Black. Com., p. 181.

⁵ *Post*, § 558.

⁶ Co. Litt. 188a.

their heirs, the court held that B. and her children on the death of the testator took an estate in joint tenancy in fee, including all children of B. born during A.'s life, and the objection that the estate would commence at different times was ignored.¹

§ 539. Statutes regulating the subject of joint tenancy.— In many of the states statutes exist which provide that every estate given by will or conveyance to two or more persons shall be construed an estate in common, unless it is expressed therein that the devisees or grantees shall take as joint tenants, or by some similar language. In other states, the statutes, while not formulating a rule of construction, expressly abolish the right of survivorship among joint tenants, and declare that joint tenancy shall assimilate to tenancy in common.² These statutes reverse the rule or presumption of the common law that a devise or a bequest to two or more persons without explanatory words creates a joint tenancy. Under these statutes it is the rule that a bequest to two or more without restrictive or explanatory language is to be construed as a tenancy in common, *unless a different intention on the part of the testator is indicated by the will*. If the will is altogether silent, the statute speaks and declares that such a gift creates a tenancy in common.³

¹ Oates d. Hatterley v. Jackson, 2 Stra. 1172; Kansas City L. Co. v. Hill, 3 Pickle (Tenn.), 589, 596, 11 S. W. R. 797.

² Hampton v. Wheeler, 99 N. C. 222 (1888), 6 S. E. R. 266; Bishop v. McClelland's Ex'rs, 44 N. J. L. 450 (1882), 16 Atl. R. 1; In re Kimberley, 150 N. Y. 90, 44 N. E. R. 945; Dana v. Murray, 122 N. Y. (1890), 604; Braze-more v. Davis, 55 Ga. (1875), 504; Miller v. Miller, 16 Mass. 59; Simons v. McLain, 51 Kan. 153, 32 Pac. R. 919; Harvey v. Harvey, 72 N. C. 570; Burghart v. Turner, 12 Pick. (29 Mass., 1832), 534; Young v. De Bruhl, 11 Rich. (S. C., 1856), L. 638; Johnson v. Harris, 5 Hayw. (6 Tenn.) 113.

³ Utz's Estate, 43 Cal. (1872), 200, 304; Lord v. Moore, 20 Conn. (1849), 122, 126; Morris v. Bolles, 31 Atl. R. 538, 65 Conn. 45; Hoyle v. Jones, 30

Ga. 40; McRea v. Dutton, 95 Ga. 267, 22 S. E. R. 149; Wright v. Harris, 116 N. C. 462, 21 S. E. R. 914; Johnson v. Johnson, 128 Ind. 93, 96; Heller v. Heller, 35 N. E. R. 798, 147 Ill. 621; Barclay v. Platt, 170 Ill. 384, 387, 48 N. E. R. 972; Harrison v. Botts, 4 Bibb (7 Ky., 1815), 420; Simons v. McLain, 51 Kan. 153, 32 Pac. R. 919; Proctor v. Smith, 8 Bush (71 Ky., 1871), 81, 84; Annable v. Patch, 3 Pick. 160; Hamilton v. Pitcher, 53 Mo. 334; Russell v. Russell, 122 Mo. Sup. 235, 26 S. W. R. 677; Rodney v. Landreau, 104 Mo. 251; Jones v. Jones, 13 N. J. Eq. 236, 238; Vreeland v. Van Riper, 17 N. J. Eq. 133; Bishop v. McClelland, 37 N. J. Eq. 163; Maxwell v. Higgins, 38 Neb. 671, 57 N. W. R. 388; Coster v. Lorillard, 14 Wend. (N. Y., 1835), 342; Moffett v. Elmendorf, 152 N. Y. 475, 46 N. E. R. 845; In re Munter's

But an estate may be devised in joint tenancy. Nor is it necessary that the testator should use the words "joint tenancy," if he shall employ language clearly expressing an intention to create a joint tenancy.¹ Thus, in the case of a devise to A., B. and C., and to the survivor and the heirs of the survivor,² or to A. and B. and the longest liver of them,³ a joint tenancy is created.⁴

§ 540. **Constitutionality of statutes abolishing joint tenancy.**—The guarantees which have been inserted in the constitutions of the various states, protecting vested property rights from legislative encroachment, and the prohibition of the passage of statutes which shall have a retroactive operation, are applicable to statutes which have been passed in the various states abolishing joint tenancy, or changing it into a tenancy in common. Upon general principles it would seem that such a statute passed *after an estate has vested on the death of the testator* could legally have no retroactive effect upon any interest in such property. But in Massachusetts a contrary view has been held. The courts of that state have determined that these statutes, so far as they abolish the right of survivorship attached to a joint tenancy, may be applied to vested estates, as they give the tenant who dies a more beneficial interest than he enjoyed at the common law. And, on the

Will, 44 N. Y. S. 605; *Tompkins v. Verplanck*, 42 N. Y. S. 412; *Purdy v. Hayt*, 92 N. Y. 446, 454; *Dana v. Murray*, 122 N. Y. 604, 615; *In re Kimberley's Estate*, 150 N. Y. 90, 44 N. E. R. 945, 38 N. Y. S. 399; *Hampton v. Wheeler*, 99 N. C. 222, 6 S. E. R. 230; *Silliman v. Whitaker*, 119 N. C. 89, 93; *Sarjeant v. Steinberger*, 2 Ohio (1825), 305; *Penn v. Cox*, 16 Ohio (1847), 30; *Wilson v. Fleming*, 13 id. 68; *Sturm v. Sawyer*, 2 Pa. Super. Ct. 254, 38 W. N. C. 536; *Church v. Church*, 23 Atl. R. 302, 15 R. L. 38; *Cannon v. Apperson*, 14 Lea (82 Tenn.), 553.

¹*Coster v. Lorillard*, 14 Wend. (N. Y.) 340. The use of negative words showing an intention *not* to create a tenancy in common is not necessary. *Coudert v. Earl*, 45 N. J. Eq. 654, 18 Atl. R. 220. A devise in

trust for several children to continue until the death of all of them makes them tenants in common, and on the death of one of them during the trust his share goes to his estate. *Morris v. Bolles*, 31 Atl. R. 538, 65 Conn. 45.

²*Hannon v. Christopher*, 84 N. J. Eq. 459, 462.

³*Pierce v. Baker*, 58 N. H. 531.

⁴And in one case it was held that where articles of little intrinsic value were given to several by name in words which would ordinarily create a tenancy in common, with an evident intention to keep them in the family, a joint tenancy would be implied. *Gilbert v. Richards*, 7 Vt. 203; *Decamp v. Hall*, 42 Vt. 83. See also *Anderson v. Parsons*, 4 Me. 486.

other hand, they do not deprive the survivor of any interest, for he may defeat the joint tenancy in his life-time by conveying to a stranger, or suing in partition.¹

§ 541. **The characteristics of an estate by the entirety.**—Tenure by the entirety is *sui generis*. It is based solely upon the common-law unity of husband and wife. In theory there is but one owner of the estate. *Both parties* to the marriage relation are proprietors of the *whole estate* and of every part and parcel of it. During the joint lives of the husband and wife it is wholly in the control of the former, who may claim its profits. But he cannot dispose of or incumber it without the consent of the wife,² and it is always subject to the restriction that, on the death of either, the whole estate goes to the other. This is of necessity; for, as the estate is incapable of partition by either the husband or the wife, nothing can descend to the heirs of either. On the death of either, his or her title is extinguished, but no new title is created. Both enjoy the legal title, and the survivor does not take the estate from the one who dies as a new acquisition, but continues to hold under the instrument creating the estate. The interest which he has is simply a continuation of that which he formerly enjoyed, augmented by the interest of his deceased joint tenant; or perhaps we may say more correctly, free from the incumbrance of it. On the death of the survivor, his or her heirs will take the fee of the whole estate, to the exclusion of the heirs of the other tenant who died first.³ As has been noted, unless a statute permits partition at common law an estate by the entirety cannot be partitioned.⁴

§ 542. **The creation of estates by the entirety in wills.**—Where the testator gives an estate in land in fee to a man and his wife, they will take as tenants by the entirety at common law. For, because of the common-law unity of husband and wife, they cannot take either as joint tenants or tenants in

¹ *Miller v. Miller*, 16 Mass. (1819), 59, 61. See also *Wildes v. Van Voorhis*, 15 Gray (81 Mass.), 139, 147; *Burghardt v. Turner*, 12 Pick. (29 Mass.) 534, 539; *Annable v. Patch*, 3 Pick. (20 Mass.) 360, 363; *Holbrook v. Finney*, 4 Mass. (1808), 566, 568; *Dunn v. Sargeant*, 101 Mass. 336, 340; *Clark v. Cordis*, 4 Allen (86 Mass., 1862), 466, 475. Cf. *Stilphen v. Stilphen*, 65 N. H. 126, 23 Atl. R. 79; *Dowling v. Salliotte*, 83 Mich. 131, 47 N. W. R. 225.

² 2 Black. Com., p. 181.

³ Litt., § 665; Co. Litt. 187; 2 Vern. 120; 2 Lev. 39.

⁴ See cases cited in note 2, p. 708.

common. Where they take an estate by the entirety, neither is seized of the moiety of the estate, but both are seized of the entirety *per tout*, and not *per my*;¹ and the consequence of this tenure is, that neither the husband nor the wife can dispose of or incumber part of the estate by his or her separate conveyance without the consent of the other; and on the death of either the husband or the wife all the estate devolves upon the survivor.² It is not necessary that the will should in terms describe the persons to whom the estate is given as husband and wife.³ If the will does not mention the marriage relation as existing between them, the fact that it does exist may be proved by parol evidence.⁴

¹ 2 Black. Com., p. 181.

² Robinson v. Eagle, 29 Ark. (1874), 202; Beggs v. Boggs, 54 Ga. 95, 97; Almond v. Bonnell, 76 Ill. 536, 540; Riggin v. Love, 72 Ill. 553; Lux v. Hoff, 47 Ill. (1868), 425, 428; Hulett v. Inlow, 57 Ind. (1870), 412, 414; Arnold v. Arnold, 30 Ind. (1868), 305, 306; Davis v. Clark, 26 Ind. (1866), 424, 428; Jones v. Chandler, 40 Ind. 588; Simpson v. Pearson, 31 Ind. (1869), 1; Thornburg v. Wiggins, 34 N. E. R. 399, 135 Ind. 178, 181; Carver v. Smith, 90 Ind. 215, 222; McConnell v. Martin, 52 Ind. 434, 436; Hoffman v. Stigers, 28 Iowa (1869), 302, 307; Moore v. Moore, 12 B. Mon. (Ky.) 651; Babbitt v. Scroggin, 1 Duv. (62 Ky., 1863), 272; Harding v. Springer, 14 Me. 407, 408; Robinson's Appeal, 88 Me. 17, 21; Greenlaw v. Greenlaw, 13 Me. (1837), 182, 186; Wales v. Coffin, 13 Allen (95 Mass.), 213, 215, 217; Shaw v. Hearsay, 5 Mass. (1809), 521, 523; Fox v. Fletcher, 8 Mass. 274; Abbott v. Abbott, 97 Mass. 186; Craft v. Wilcox, 4 Gill (Md.), 504; Marburg v. Cole, 49 Md. 402, 413; Flading v. Ross, 58 Md. 13, 24; Jacobs v. Miller, 50 Mich. 119; Fisher v. Provin, 25 Mich. (1872), 347; Wait v. Bovee, 35 Mich. (1877), 425, 428; Thornton v. Exchange, 17 Mo. (1851), 221; Kip v. Kip, 33 N. J. Eq. 213; Lee v. Zabriskie, 28 N. J. Eq. (1877), 422, 428; Thomas v. De Baum,

14 N. J. Eq. 37, 78, 80; Den v. Gardner, 20 N. J. Law, 556, 562; Allen v. Tate, 58 Miss. 585; Oglesby v. Bingham, 13 S. E. R. 852, 69 Miss. 795; Noblitt v. Beebe, 35 Pac. R. 248, 23 Oreg. 4; In re Young's Estate, 3 Pa. Dist. R. 443; French v. Mehan, 56 Pa. St. 286, 288; In re Bramberry's Estate, 27 Atl. R. 405, 156 Pa. St. 628, 632, 33 W. N. C. 92; Den v. Branson, 5 Ired. (N. C.) L. 426; Hunter v. Wheeler, 99 N. C. 222, 225; Phillips v. Hodges, 109 N. C. 248; Rogers v. Benton, 5 Johns. Ch. (N. Y.) 431; Wright v. Sadler, 20 N. Y. 820, 824; Torrey v. Torrey, 14 N. Y. 430, 432; Jackson v. Stevens, 16 Johns. (N. Y.) 110; Ward v. Krumm, 54 How. Pr. (N. Y.) 95; Stuckey v. Keefe, 26 Pa. St. 397, 401; Georgia C. & N. Ry. Co. v. Scott, 30 S. C. 34, 40, 16 S. E. R. 185; id. 839; McLeod v. Tarrant, 39 S. C. 271, 280, 17 S. E. R. 773; 2 Bl. Com., p. 182; 2 Kent, Com. 132; Brownson v. Hull, 16 Vt. 309, 312; Corinth v. Emery, 63 Vt. 505, 22 Atl. R. 618; Chambers v. Chambers, 23 S. W. R. 67, 92 Tenn. 707; Berrigan v. Fleming, 2 B. J. Lea (Tenn.), 271; Ketchum v. Walsworth, 5 Wis. 95, 102.

³ Thornburg v. Wiggins, 135 Ind. 178, 181. See cases cited in note 2.

⁴ The law does *not* annex a condition to an estate by the entirety that *each of the grantees shall remain*

§ 543. **Devises to husband and wife as tenants in common with others.**—As a result of the rule of construction above explained,¹ by which a devise to husband and wife makes them tenants by entirety, it follows that, where a devise is to them concurrently with others, they will take *one share between them*.² In other words, if land is devised to A. and B., who are husband and wife, concurrently with C., a third person, one-half will go to A. and B. as tenants by the entirety, and the other half to C.³ Nor is it material that the gift is to the husband and wife and the other person as tenants in common,⁴ though this circumstance in some cases has been regarded as showing an intention on the part of the testator that all shall take as tenants in common in equal shares.⁵

§ 544. **The effect of statutes abolishing joint tenancy on estates by the entirety.**—It is generally held that the common-law rules of construction above explained, regarding devises to husband and wife,⁶ are not abrogated by the statutes which have abolished survivorship in joint tenancy, or which have turned joint tenancy into tenancy in common, or which expressly provide that a grant or devise to two or more persons, without an express direction that they shall take as joint tenants, shall create a tenancy in common.⁷ But both at common law, and now of course undoubtedly under the various statutes, an estate may be created in the husband and wife by express words, or by necessary implication, which shall not be an estate by the entirety, but which shall be an estate either in tenancy in common or in joint tenancy.⁸

faithful to the obligations of the marriage state, or that the violation of such condition, judicially determined in divorce proceedings, shall vest the whole estate in the innocent party. Steltz v. Shreck, 28 N. E. R. 510, 128 N. Y. 263.

¹ See § 542.

² Hulett v. Inlow, 57 Ind. 412, 414.

³ Lewin v. Cox, Moore, 558, pl. 759; Co. Lit. 17a; Litt., § 291; Bricker v. Whatley, 1 Vern. 233.

⁴ Warington v. Warington, 2 Hare, 54.

⁵ Lewin v. Cox, Moore, 558; Paine v. Wagner, 12 Sim. 184.

⁶ See § 542.

⁷ Hoffman v. Stigers, 28 Iowa (1869), 302, 306; Marburg v. Cole, 49 Md. (1878), 402; Normun v. Abbot, 12 Mass. (1815), 474; Shaw v. Hearsay, 5 Mass. 521; Dowling v. Salliotte, 83 Mich. (1890), 131, 134; Jackson v. Stevens, 16 Johns. (N. Y.) 115; Phillips v. Hodges, 13 S. E. R. 769, 109 N. C. 248; Bramberry's Estate, 156 Pa. St. 628, 632; Stuckey v. Keefe, 26 Pa. St. (1856), 397; Thomas v. De Baum, 2 Lea (70 Tenn.), 271. See cases cited in note 2, p. 708.

⁸ Cooper v. Cooper, 76 Ill. (1875), 57, 64; Barden v. Overmeyer, 134 Ind.

§ 545. **Effect of statutes regulating the property status of married women on estates by entirety.**—As regards the effect of the statutory legislation, by which the wife is now secured in the enjoyment of the legal interest in her property without the intervention of trustees, and without the creation of a separate use or trust, free from the control or interference of the husband, on estates by the entirety, two views are held. In most cases, in the absence of any provision to the contrary, such statutes are not regarded as destroying the unity of husband and wife, under the rule that a devise to them shall create an estate by the entirety.¹ But other authorities hold that, in so far as the sole reason for the existence of such a description of tenure was the assumed unity of husband and wife at the common law, when such unity may be assumed to be abolished by the modern statutes, which secure the legal identity and property rights of a married woman to her as though she were a single woman, that the estate by the entirety ought to be regarded as abolished. Viewing this estate as based upon an irrational and absurd legal fiction which no longer exists, and as the outgrowth of social conditions which have long since disappeared, these authorities, even if the statute is silent, have considered this species of tenure as abolished. In such states, therefore, a devise to a husband and wife will be taken as a tenancy in common, unless the testator shall manifest an intention that they shall take as tenants by the entirety.²

(1893), 660, 34 N. E. R. 439; *Thornburg v. Wiggins*, 135 Ind. 178, 34 N. E. R. 999; *Phelps v. Simons*, 34 N. E. R. 657 (1893), 159 Mass. 415; *Bertles v. Nunan*, 92 N. Y. 152, followed in *Jooss v. Fey*, 29 N. E. R. 136, 129 N. Y. 17. Thus, it has been held in New York that a devise to the son of the testator and his wife of the use of a farm for their benefit and support, during their natural lives, creates in them an estate in common, since otherwise the evident intention of the testator to provide for the support of the wife would be in danger of defeat. *Miner v. Brown*, 31 N. E. R. 24, 133 N. Y. 308.

¹ *Stilphen v. Stilphen*, 23 Atl. R. 79, 65 N. H. 126; *Dowling v. Salliotte*, 47 N. W. R. 225, 83 Mich. 131; *In re Bramberry's Estate*, 27 Atl. R. 405, 156 Pa. St. 628, 33 W. N. C. 92; *Jooss v. Fey*, 129 N. Y. 17, 29 N. E. R. 136; *Hiles v. Fisher*, 67 Hun, 229; *Thornburg v. Wiggins*, 135 Ind. 178, 180.

² *Whittlesey v. Fuller*, 11 Conn. (1836), 337; *Cooper v. Cooper*, 76 Ill. 57; *Hoffman v. Stigers*, 28 Iowa (1870), 302; *Clark v. Clark*, 56 N. H. 105; *Wilson v. Fleming*, 13 Ohio (1844), 68; *Robinson's Appeal*, 88 Me. 17, 24.

CHAPTER XXV.

GIFTS BY WILL TO CHILDREN AS PURCHASERS.

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| <p>§ 546. Whether "children" is a word of purchase or of limitation.</p> <p>547. Extension of the meaning of the word "children."</p> <p>548. Bequests and devises to "children" as purchasers.— Primary meaning of the word.</p> <p>549. The word "children" does not presumptively include step-children.</p> <p>550. The status of an adopted child. When it inherits as heir or issue.</p> <p>551. Gifts to children include those of different marriages.</p> <p>552. Gifts to children living at the execution of the will.</p> <p>553. When the class is to be ascertained in the case of immediate gifts to children.</p> <p>554. Devises to children where distribution is to be at majority.</p> <p>555. Construction of a clause directing distribution when the youngest child shall attain the age of twenty-one.</p> <p>556. Testimony to prove the age of a legatee.</p> <p>557. The operation of the words "living," "then living," and "surviving," in determining when class of children is to be ascertained.</p> | <p>§ 558. When children as a class are to be ascertained in the case of a remainder.</p> <p>559. Gifts to children born or to be born.</p> <p>560. Distribution amongst children, when to be <i>per capita</i>.</p> <p>561. Direction for an equality of division favors distribution <i>per capita</i>.</p> <p>562. Whether the distribution amongst the children of several persons shall be <i>per stirpes</i> or <i>per capita</i>.</p> <p>563. Where children take by substitution the distribution will be <i>per stirpes</i>.</p> <p>564. Mode of distribution where the devise is to individuals and the children of another.</p> <p>565. Erroneous statement of the number of children.</p> <p>566. Construction of provision for a devise over in case legatee dies without children.</p> <p>567. Children <i>en ventre sa mere</i>.</p> <p>568. Presumption of legitimacy— Character of proof of illegitimacy of legatee.</p> <p>569. Competency of husband or wife to prove legitimacy.</p> |
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§ 546. Whether "children" is a word of purchase or of limitation.— The word "children," when it is used in its natural sense in a will, is equivalent to immediate issue, exclusive of grandchildren or other remote issue, and it is then usually a word of purchase, and not of limitation.¹ A common example of this is to be found in a devise to A. for life, and on his

¹ Cf. *post*, § 579 et seq.

death to his children. Here A. will take a life estate, with a vested remainder in those of his children, as a class, who are living at the testator's death, which will open and let in after-born children.¹ If, however, the property is given *to A. and his children, simpliciter*, and at the death of the testator *he has no children*, the word "children" will be taken as a word of limitation, and A. will take an estate in fee-tail, which will be turned into a fee-simple by the statutes, and which will not be divested by the birth of children.² Coupling the word "children" with "descendants" may indicate that the former word is a word of limitation, and not of purchase, and the parent will then take a fee, and the children, if any, will take by descent.³

§ 547. **Extension of the meaning of the word "children."** The word "children," as has been stated,⁴ does not ordinarily include grandchildren, or more remote issue. It is confined to immediate descendants in the first degree. But the word may be construed to comprise grandchildren, and even more remote descendants, where there are no persons in existence, at the making of the will, who would answer to the meaning of the word in its primary sense, or where there could not be any such at the time of the death of the testator, or at the date of a future event, on the happening of which the estate is to vest. For example, if the testator shall provide for the children of A., *who is deceased at the date of the execution of the will*, having left him surviving no children, but having left *grandchildren, or other more remote descendants*, it will be presumed that the testator intended that the grandchildren, and other descendants of deceased children, shall take as children.⁵ The

¹ *Beacroft v. Strawn*, 67 Ill. (1873), 28; *Ridgeway v. Lanphear*, 99 Ind. 251, 257; *In re Sanders*, 4 Paige (N. Y., 1844), 293; *In re Peale's Estate*, 31 W. N. C. 551; *Seybert v. Hibbert*, 5 Pa. Super. Ct. 537, 41 W. N. C. 85; *Jones v. Cable*, 114 Pa. St. (1886), 486, 7 Atl. R. 791; *Affolter v. May*, 115 Pa. St. 54 (1887), 8 Atl. R. 20; *Appeal of Keim*, 17 Atl. R. 463, 125 Pa. St. 480, 24 W. N. C. 135; *In re Giffin's Estate*, 22 Atl. R. 91, 138 Pa. St. (1890), 327; *Anderson v. Anderson*, 30 Atl. R. 304, 164 Pa. St. 328; *Forest Oil Co.*

v. Crawford, 77 Fed. R. 106, 8 L. R. A. 740.

² *Lofton v. Murchison*, 80 Ga. 391 (1888), 7 S. E. R. 322; *Hood v. Dawson* (Ky., 1896), 33 S. W. R. 75; *Chrystie v. Phyfe*, 19 N. Y. (1859), 344, 353; *Wild's Case*, 6 Rep. 17; *Silliman v. Whitaker*, 119 N. C. 89, 25 S. E. R. 752; *post*, § 579.

³ *Mason v. Ammon*, 11 Atl. R. 449, 117 Pa. St. 127. *Cf. post*, § 662.

⁴ § 546.

⁵ *Rhoton v. Blevin*, 99 Cal. 649; *Ewing v. Handley*, 4 Litt. (14 Ky.,

circumstances of the testator's family, or of the family of the person who is named as parent, may be proved by parol, and are always to be considered. Such circumstances may present a very strong case for extending the signification of the word "children," where they show there are no children living, for then the provision would be inoperative. This rule of construction is not applied where the parent is alive at the date of the will, for, though he has no children then, he may have children born subsequently to the execution of the will.

Again, the word will have a wide signification where, from the context, it is apparent that the testator used the word "children" in other portions of his will than the one in question as synonymous with "descendants" or "issue." For the question always is, not so much the primary meaning of this or any word, as what the testator meant by his use of it.¹ Hence, if the testator has expressly provided for the substitution of "children" in the place of their deceased parents; as, for example, where he provides that, in a gift to children, the issue or children of any legatee who is deceased shall take their parent's share;² or, where the devise is to be equally divided among children at a future date, and those who may be legally entitled thereto, with a provision that if any of the children or *their successors should dispute the will* the legacy was to be forfeited, the grandchildren will take.³

1823), 346, 349; *Mowatt v. Carow*, 7 Paige (N. Y., 1838), 328; *Prowitt v. Rodman*, 37 N. Y. 42; *In re Smith*, L. R. 35 Ch. D. 553, 558, 56 L. J. Ch. 771, 56 L. T. (N. S.) 878, 35 W. R. 663; *In re Schedel*, 73 Cal. 594, 15 Pac. R. 297; *Berry v. Berry*, 3 Giff. 134, 9 Wkly. R. 889; *Fenn v. Death*, 23 Beav. 73.

¹ *Waddell v. Leonard*, 53 Ga. 697; *Osgood v. Lovering*, 33 Me. 464, 469; *Ide v. Ide*, 5 Mass. (1809), 500; *Bowker v. Bowker*, 148 Mass. 203; *Edgerly v. Barker*, 66 N. H. (1891), 434, 450; *In re Brown*, 29 Hun, 417; *In re Patton*, 41 Hun, 497; *Logan's Will*, 131 N. Y. 456, 30 N. E. R. 485; *McKeehan v. Wilson*, 53 Pa. St. (1866), 74, 77; *Urich's Appeal*, 86 Pa. St. (1878),

386, 390; *Douglas v. James*, 28 Atl. R. (Vt.) 319; *Parkman v. Bowdoin*, 1 Sumn. C. C. 359; *Lilliebridge v. Adie*, 1 Mason, C. C. (1817), 224; *In re Patton*, 111 N. Y. 487; *Sarver v. Berndt*, 10 Pa. St. 213.

² *Long v. Labor*, 8 Pa. St. 231; *ante*, § 353.

³ *In re Patton*, 161 N. Y. 480, 18 N. E. R. 625. A power to devise to children may be exercised in favor of grandchildren whose parents are deceased, where it was clearly the intention of the donor of the power that the parents, if they had survived, would have taken a fee. *Thorington v. Hale* (Ala., 1897), 21 S. R. 335; *Chenault v. Chenault*, 88 Ky. 83, 11 S. W. R. 424. *Cf. post*, § 803.

§ 548. **Bequests and devises to children as purchasers — Primary meaning of the word.**— The word “children” in its primary meaning is limited to descendants in the first degree, *i. e.*, the immediate issue or offspring of the parent. This is the technical and legal signification of the term, agreeing with its ordinary sense, and, in the absence of a clear indication of a contrary intention in the context, it must be taken in this sense and not as including grandchildren.¹ And it will require express words, or very strong and necessary implication arising from the will itself, to show that the testator intended to include grandchildren in a gift to children *simpliciter*.² In-

¹ *Ante*, § 547.

² *McGuire v. Westmoreland*, 36 Ala. 594; *Willis v. Jenkins*, 30 Ga. 167, 169; *Walker v. Williamson*, 25 Ga. 549; *White v. Rowland*, 67 Ga. 554; *Pugh v. Pugh*, 105 Ind. 552, 555; *West v. Rassman*, 135 Ind. 278, 296; *Yeates v. Gill*, 9 B. Mon. (48 Ky., 1848), 203; *Churchill v. Churchill*, 2 Metc. (59 Ky., 1859), 466; *Sheets v. Grubbs*, 4 Metc. (61 Ky.) 339, 340; *Phillips v. Beall*, 9 Dana (39 Ky., 1839), 14; *Wharton v. Silliman*, 22 La. Ann. 343; *McLeod v. Dell*, 9 Fla. 443; *Osgood v. Lovering*, 33 Me. 464, 469; *Demill v. Reid*, 71 Md. 175, 17 Atl. R. 1014; *Taylor v. Watson*, 35 Md. 519, 523; *Houghton v. Kendall*, 7 Allen, 72, 77; *Thomson v. Ludington*, 104 Mass. 193; *Ward v. Cooper*, 69 Miss. 789, 13 S. R. 827; *Edgerly v. Barker*, 66 N. H. 434, 450, 31 Atl. R. 900; *Feit's Ex'r v. Vanatta*, 21 N. J. Eq. 84, 85; *Jackson v. Staats*, 11 Johns. (N. Y.) 837; *Mowatt v. Carow*, 7 Paige (N. Y.), 328, 329; *Lawrence v. Hebbard*, 1 Bradf. 252; *Stires v. Van Rensselaer*, 2 Bradf. 172; *Hone v. Van Schaick*, 3 N. Y. (1850), 538; *Low v. Harmony*, 72 N. Y. 408, 413; *Marsh v. Hague*, 1 Edw. Ch. (N. Y., 1831), 174, 186; *In re Logan's Estate*, 30 N. E. R. 485, 131 N. Y. 456, 460; *Tier v. Pennell*, 1 Edw. Ch. 354; *Shannon v. Pickell*, 8 N. Y. S. 584, 55 Hun, 127; *In re Potter's Estate*, 24 N. Y. S. 586, 71 Hun, 77; *Gregory v.*

Beasley, 1 Ired. (36 N. C., 1841), Eq. 25; *Denny v. Closse*, 4 Ired. Eq. (39 N. C.) 102; *Ward v. Sutton*, 5 Ired. Eq. (40 N. C.) 421; *Mordecai v. Boylan*, 6 Jones Eq. (55 N. C., 1854), 365; *Sinton v. Boyd*, 19 Ohio St. 30; *Hough v. Hough*, 4 Rawle (Pa.), 363; *Dickinson v. Lee*, 4 Watts (Pa., 1835), 82; *Hallowell v. Phipps*, 2 Whart. (Pa., 1837), 376, 380; *Gross' Estate*, 10 Pa. St. 361; *Herr's Estate*, 26 Pa. St. 467; *Gable's Appeals*, 40 Pa. St. 231, 236; *McKeehan v. Wilson*, 53 Pa. St. 74, 77; *Castner's Appeal*, 88 Pa. St. 478, 484; *Tillinghast v. D'Wolf*, 8 R. I. (1865), 69, 72; *In re Reynolds*, 39 Atl. R. 896 (R. I., 1898); *Ruff v. Rutherford*, 1 Bailey Eq. (S. C., 1830), 7; *Shanks v. Mills*, 25 S. C. 358; *Brabham v. Crossland*, 25 S. C. 525; *Smith v. Smith*, 24 S. C. 304; *Snoddy v. Snoddy*, 1 Strobb. Eq. (S. C., 1846), 84, 87; *Izard v. Izard*, 2 Des. Eq. (S. C.) 303, 308; *Morton v. Morton*, 2 Swan (32 Tenn., 1853), 318, 320; *Booker v. Booker*, 5 Humph. (24 Tenn., 1844), 505; *Turner v. Ivie*, 5 Heisk. (52 Tenn., 1871), 222, 230; *Tebbs v. Duval*, 17 Gratt. (Va., 1867), 349; *Moon v. Stone*, 19 Gratt. (Va., 1870), 130; *Hudson v. Hudson*, 6 Munf. (Va., 1818), 352; *Morris v. Owen*, 2 Call (Va., 1801), 520; *Graham v. Graham*, 4 W. Va. 323; *Loring v. Thomas*, 2 Dr. & Sm. 497; *Holland v. Wood*, L. R. 11 Eq. 91, 96; *In re Kirk*, 52 L. T. (N. S.)

deed it would seem from some of the authorities that grandchildren will only be permitted to take under a gift to children where some of the provisions of the will would otherwise be inoperative.¹ The circumstance that the testator has employed the words "children" and "grandchildren" in the same clause shows that he does not intend to include grandchildren in a devise to children.² The general rule is applicable to a devise to *children as a class, their heirs and assigns, equally*, for these added words are merely words of limitation, and do not give an estate to the grandchildren.³ Nor does the fact that all the children *are named* in connection with a devise to children living at a future date extend the meaning of the word so as to include the issue of any children who have died before the time of distribution. The word "grandchildren" in its primary meaning signifies the children of children, that is, lineal descendants in the second degree, and it usually will not be construed to include great-grandchildren; unless an express or implied intention to that effect shall appear from the will.⁴ If, however, the testator has used the word "grandchildren" in *any* portion of his will to indicate a great-grandchild, it may be

546; *Powell v. Powell*, 28 L. T. (N. S.) 730; *Radcliffe v. Buckley*, 10 Ves. 195, 198; *Moor v. Raisbeck*, 12 Sim. 123; *Earl of Oxford v. Churchill*, 3 Ves. & B. 59; *In re Orton's Trusts*, 16 L. T. (N. S.) 146, L. R. 3 Eq. 375; *Reeves v. Brymer*, 4 Ves. 692; *Bowen v. Lewis*, L. R. 9 App. 890; *Crooke v. Brookeing*, 2 Vern. 106; *Hussey v. Dillon*, Amb. 603, 2 Eden, 194. The declarations of the testator are not receivable to show that by the word "children" he meant grandchildren or other issue, or that he meant to include step-children or illegitimate children. But the circumstances of the testator's family, or of the family of the person named as the parent of the children, are always admissible and may be proved by parol. *Willis v. Jenkins*, 30 Ga. 169; *Mordecai v. Boylan*, 6 Jones Eq. (59 N. C.) 365.

¹ *Reeves v. Brymer*, 4 Ves. 692. A

power of appointment among children is not validly executed by a devise which includes grandchildren. *Cruse v. McKee*, 2 Head, 1; *Snoddy v. Snoddy*, 1 Strobb. (S. C.) 84, 87; *post*, § 803.

² *Tillinghast v. D'Wolf*, 8 R. I. 69, 72. *Cf. Brabham v. Crosland*, 25 S. C. 525.

³ *Dickinson v. Lee*, 4 Watts (Pa., 1835), 82, 83. But compare, *contra*, *Bond's Appeals*, 31 Conn. (1862), 183; *Sarver v. Berndt*, 10 Pa. St. (1849), 213, where the devise was to "children and their heirs in equal shares," and the court construed the word "heirs" as a word of purchase meaning grandchildren. See as to the meaning of the word "heirs," § 606.

⁴ *Bragg v. Carter*, 50 N. E. R. (Mass., 1898), 640; *Yeates v. Gill*, 9 B. Mon. (48 Ky., 1848), 203, 204; *Dooling v. Hobbs*, 5 Harr. (Del., 1853), 405.

presumed that he has used it to indicate such person in the clause under consideration.¹

§ 549. The word "children" does not presumptively include step-children.—Under the general rule of construction that, where relations of any class are mentioned in a will, relations by consanguinity only are *prima facie* presumed to be intended, step-children are not entitled under a devise to children.² This presumption is greatly strengthened if the testator gives a legacy to his *step-children as such*.³ But it may appear from the language of the will itself, or from the evidence of the surrounding circumstances, that the testator meant to include his step-children in a provision for his children *simpliciter*. If, at the date of the execution of the will, he has *no children of his own*, while his wife *then* has several living children *by her former marriage*, whom he had treated as his own, it may be conclusively presumed that he intended to benefit *them* by a provision for "*his children*."⁴ This construction will be favored where the testator has been married some time without having children, and his wife is beyond the period of possible child-bearing, so that future children could not have been in mind. It is clear that where the testator designates legatees as his *step-children*, or *his children by marriage*, or where he distinguishes between his step-children and his own children, dividing his estate equally between them as classes, the former are precluded from claiming as of the latter class.⁵

¹ *Hussey v. Berkeley*, 2 Eden, 194, Amb. 602. A provision for the distribution of a fund among the grandchildren of the testator living at a certain date does not include great-grandchildren, though at the time of the making of the will the testator had no grandchildren. *Smith v. Lansing*, 53 N. Y. S. 633, 24 Misc. R. 586.

² *Blankenbaker v. Snyder* (Ky., 1897), 36 S. W. R. 1124; *Fouke v. Kemp*, 5 Harr. & J. (Md., 1820), 135; *Cutter v. Doughty*, 23 Wend. (N. Y., 1840), 513, 520; *In re Hallet*, 8 Paige (N. Y.), 375; *Sydnor v. Palmer*, 29 Wis. 226, 244; *Shelley v. Bryer*, Jac. 207. See also *Thornburg v. Am. Str. Co.*, 141 Ind. 443.

³ *Lawrence v. Hebbard*, 1 Bradf. (N. Y.) 252, 255.

⁴ *In re Jeans*, *Upton v. Jeans*, 72 L. T. 835, 13 Rep. 627.

⁵ *In re Kurtz's Estate*, 23 Atl. R. 322, 145 Pa. St. 637. *Prima facie* a son-in-law or a daughter-in-law of the testator is not permitted to take under a devise to his children as a class, or to his sons or daughters as a class. But the facts and circumstances of the family life of the parties concerned are, upon the principles discussed in the text, admissible to show, not that the testator meant to give a legacy where the will gives none, but to explain the meaning of the terms employed.

§ 550. **The status of an adopted child — When it inherits as heir or issue.**—Whether an adopted child of the testator or of another person shall be included under a gift to the children, heirs, issue, next of kin, or other relatives of that person, as a class, depends, *first*, upon the statutory regulations by which the legal *status* of the adopted child is determined; and *secondly*, and principally, upon the expressed intention of the testator regarding him or her. The adoption of children was not recognized by the common law. It was common in the days of the Roman empire, and the principles which regulate it in the United States are based upon the rules of the Roman civil law, and are also wholly of statutory origin. Many of the statutes provide that the adopted child may not only *assume the name of the person adopting* him or her, but that he or she shall *have all the rights of a child and heir of that person*.¹ If, therefore, the statute confers upon him *all* the rights of an heir or of a child, he will be permitted to take under a *devise to the heirs of the person adopting him*,² or under a gift to the children or the next of kin of that person. In the absence of an express statutory provision that the adopted child shall have all the rights of an heir or child of the person adopting him, a devise to the “children” of A.,³ or to the “nearest and lawful heirs of A.”⁴ will not include an adopted child of A. And, in any event, after a decree of adoption is judicially revoked, upon the application of the parent, a child cannot take under a devise to the lawful heirs of the adopting parent contained in the will of the adopting parent.⁵

It is elsewhere explained that the word “issue” and the word “descendants” are synonymous in their meaning.⁶ Hence where, by statute, the legal *status of a descendant* has been conferred upon an adopted child, he may take under a devise to “issue.” And he is entitled, under a statute of this

¹ Appeal of Rowan, 19 Atl. R. 82, 846; Eckford v. Knox, 67 Tex. (1886), 132 Pa. St. 299; Vidal v. Commagere 200, 203.

(1858), 13 La. Ann. 516; Fosburg v. Rogers, 114 Mo. 122 (1892), 21 S. W. R. S. R. 900.

84; Moran v. Stewart (Mo.), 26 S. W. R. 388, 7 S. W. R. 288.

962; Glos v. Sankey, 36 N. E. R. 628, 148 Ill. 536; Simmons v. Burrell, 28 N. Y. S. 625, 8 Misc. R. 388.

⁵ In re Sessions, 70 Mich. 297, 38 N. W. R. 249.

² Johnson's Appeal, 87 Pa. St. (1878),

⁶ See § 669.

character, to take as a remainderman the estate in which the adopting mother had a life interest, with a remainder in fee expressly given to *her lawful issue*.¹ But statutes of this description, being in derogation of the rules of the common law, are always to be strictly construed, and an adopted child would not thereby be enabled to take under a devise to the heirs of the body; as these words are words of procreation, and not, in their common-law sense, co-extensive in meaning with “descendants.”² An adopted child takes under a provision devising an estate in real property in remainder to such persons as would take by the intestate laws if the testator had died intestate.³

§ 551. Gifts to children include those of different marriages.—Where the testator gives property to the children of A., he will be presumed, until a contrary intention is proved, to mean *the children of A. by several marriages*.⁴ So, where he gave a legacy to his wife, with a provision for “*our minor children*,” he was presumed to include children by his first marriage and minor children by the second marriage, where it was shown that the first set of children was very young at the time the second marriage was contracted, and that they had been reared by the second wife.⁵ In order that the children of several marriages may be included under a provision for the children of A., who at the date of the will had *only been married once*, it was not necessary to show that the testator had the future marriage of A. in view.⁶ So, where the

¹ Hartwell v. Tefft, 19 R. I. (1896), 644, 647, 85 Atl. R. 882; Warren v. Prescott, 84 Me. (1892), 483, 17 L. R. A. 435; Sewall v. Roberts, 115 Mass. 262.

² Sewall v. Roberts, 115 Mass. (1874), 262; McGunnigle v. McKee, 77 Pa. St. 81. An adopted child was, by a statute, presumed to be included in a devise by the testator to his “children,” but not in a devise to the children or issue of another person. It was held that a child adopted by the wife of the testator was not entitled to share in a bequest of the residue of his estate to the heirs at law of his wife. Wyeth v. Stone, 144 Mass. (1881), 441, 11 N. E. R. 729.

The court in this case held that the words “issue,” “descendants” and “heir-at-law” are equivalent to “children,” as used in the statute preventing lapse.

³ Johnson’s Appeal, 88 Pa. St. 346, 354. Compare the cases cited in § 264, on “the revocation of a will by the adoption of a child.”

⁴ Andrews v. Andrews, L. R. 15 Ir. 199.

⁵ Crosson v. Dwyer, 9 Tex. Civ. App. 482, 489, 30 S. W. R. 929; Wampler’s Estate, 23 Pitts. L. J. 451, construing the words “all our children.”

⁶ Barrington v. Tristram, 6 Ves. 345, 348; Isaac v. Hughes, L. R. 9 Eq. (1870), 191, 193.

testator provided for his daughter's children, and her husband, who was living at the date of the will, was still living at the death of the testator, though he subsequently died, and the daughter remarried and left several children by a second husband, it was held that children born of the *marriage contracted after the death of the testator* took equally with the children of the first marriage.¹

The testator may by express language show that he intends to prefer some children of the parent designated to others; and if this is the case, his intention will be respected. So where he gave property to the "*children of his daughter by her husband W.*," it was held that the gift was confined to her children by that person, and it could not be extended to her children by a second marriage after the death of W.² And where a testator gave property to four children by a former wife who were specifically named, and two children by his present wife also specifically named, and also "*to such child or children as may be living,*" the action of the testator in expressly naming and enumerating the children excluded all children of the first marriage not named, though living at the execution and also at his death.³

Where the testator devises property to his widow, and after her death "*to her children,*" he will be presumed to mean not only *those of whom he is the father*, in which case the word "*her*" will be exactly synonymous with "*our*," but also *those who may be born to her by a subsequent marriage*, when "*her*" will have its proper meaning. The contrary, however, has been held in Louisiana on the grounds that a legacy cannot, by the peculiar law of that state, be given to a child not conceived at the death of the testator.⁴

¹ Critchett v. Taynton, 1 Ry. & My. (1830), 541, 545; Jones' Appeal, 48 Conn. 68. A gift to the children of A., "*whether by her present or any future husband,*" where A., at the date of the will, had children then living, begotten by a deceased husband, and had no other at the death of the testator, will go to these children. In re Pickup, 1 Jo. & Hem. 389.

² Stopford v. Chaworth, 8 Beav. 331, 337; ante, § 62.

³ Stavers v. Barnard, 2 Y. & C. C. C. 539. Cf. Van Voorhis v. Brintnall, 23 Hun (N. Y.), 260.

⁴ Sevier v. Douglass, 44 La. Ann. 605, 10 S. R. 804. The testator in Cogan v. McCabe, 52 N. Y. S. 48, 23 Misc. R. 739, gave a remainder for the support of the wife and children of A. (his son) until the youngest child should attain his majority, when the children were to receive the principal. The wife and child of

§ 552. Gifts to children living at the execution of the will.—The general rule that a will speaks as of the death of the testator¹ is subject to the qualification that, when a testator expressly refers to a condition of things as existing at the time of the execution, it will speak as of its date.² Under this exception, if the testator devises property to children as a class whom he describes as *now living*, meaning at the execution of the will, only those who are living at that date will be entitled to take, to the exclusion of the heirs of those who have died before the execution, and of children who are born subsequently thereto.³ And, *a fortiori*, a devise to children who are specifically *named* is a devise to them as individuals and not as a fluctuating class. Those who are alive at the date of the will corresponding to the names, if they survive the testator, will take, but no others, and the shares of those who predecease him will lapse in the absence of a statute preventing lapse.⁴ But a gift to children who are named and to others "*hereafter to be born*" is a gift to a class, and not to children as individuals, and is to be divided among the members of the class, including those who are specifically named, who survive the

A., living at the date of the will, died before the testator and A. remarried and had four children before the period of distribution. The second wife and her children were permitted to take. See *post*, § 602, and § 14, as to what time a will speaks when a husband or wife is mentioned.

¹ *Ante*, §§ 14, 15.

² *Ante*, § 15.

³ *Watson v. Watson* (Mo.), 19 S. W. R. 543; *Rowland's Estate*, 24 Atl. R. 1091, 150 Pa. St. 25; *Whitehead v. Lassiter*, 4 Jones (57 N. C., 1859), Eq. 79; *Wigden v. Mello*, L. R. 23 Ch. D. 737, 52 L. J. Ch. D. 767, 49 L. T. (N. S.) 585; *Habergham v. Ridehalgh*, L. R. 9 Eq. 395, 400; *Moffat v. Burnie*, 18 Beav. 211; *Fullford v. Fullford*, 16 Beav. 565; *James v. Richardson*, 1 Ventris, 334, 2 Ventris, 311; *Christopherson v. Naylor*, 1 Mer. 320; *Leach v. Leach*, 2 Younge & C. C. C. 495; *Ramsay v. Shelmerdine*, L. R. 1

Eq. 129; *Fitzroy v. Duke of Richmond*, 27 Beav. 186; *Burchet v. Durdant*, T. Raym. 320; *Soteldo v. Clement*, 29 Wkly. L. B. 384. But a gift to a class consisting of two or more generations may be made in such terms that all take as original members of the one class. Thus, where the devise is to children as a class, the issue of deceased children to take the share their parent would have taken if living, the children of a child dead at the date of the will take their parent's share which he would take at the period of distribution. In *re Parsons*, 8 Reports, 430; *Blaber v. Parsons*, *id.* Compare *ante*, § 354.

⁴ *Petway v. Powell*, 2 Dev. & Bat. (N. C.) Eq. 308; *Rowland's Estate*, 141 Pa. St. 553, 21 Atl. R. 735; *Brewer v. Opie*, 1 Call (Va.), 184; *Bain v. Lescher*, 11 Sim. 397; *Threadgill v. Ingram*, 1 Ired. Law (23 N. C., 1841), 577. Cf. § 337.

testator.¹ Again, a gift to children who are enumerated, as, for example, "to the five children of A.," is not usually a gift to them as a class, but to those who are in existence at the date of the will as individuals; and in case any of them die subsequently during the life-time of the testator, his legacy will lapse for the benefit of the residuary legatee or the next of kin.²

§ 553. When the class is to be ascertained in the case of immediate gifts to children.—Where a gift is to children *as a class in general terms*, and no period is mentioned by the testator for the vesting of the legacy, the gift will be immediate. That is to say, the gift will vest in title and possession at the death of the testator. Accordingly it is a general rule in these cases that only the children who have been born or begotten prior to that date, and who are *in esse*, including a child *en ventre sa mere*,³ at that time, will be entitled to a share in the distribution.⁴ It is not material whether the parent of

¹ *Shiers v. Ashworth*, L. R. 25 Ch. D. 162, 53 L. J. Ch. 180, 50 L. T. (N. S.) 18; *Downes v. Long*, 79 Md. 382, 29 Atl. R. 827. It would seem that the testator need not name the children in order that a gift shall be to them as individuals. For where the devise was "to the *surviving children of A.*" who was dead at the date of the execution, the testator stating that he did not know their names, the court held that he would have named them if he could, and hence the gift was to the children of A. as individuals living at the date of the will, to the conclusion of the heirs of those who had died and children subsequently born. *Morse v. Mason*, 11 Allen (Mass.), 36, 37.

² *In re Smith's Trusts*, L. R. 9 Ch. D. 119; *In re Stanfield*, L. R. 13 Ch. D. 84, 49 L. J. Ch. D. 750, 43 L. T. (N. S.) 310; *Sherer v. Bishop*, 4 Bro. C. C. 55. A devise to the children of A., "*now living at M.*," is not a gift to them as a class which is to be ascertained as of the death of the testator, but to all the children who are living at M. as individuals, and par-

ticularly where it appears that the testator meant that each child should take an equal portion, the descendants of any child who died after the execution of the will and during the life of the testator will take the child's share. *Jones v. Hunt*, 96 Tenn. (1896), 369, 371, 34 S. W. R. 693; *In re Sibley's Trusts*, L. R. 5 Ch. D. 494.

³ § 567.

⁴ *Ingram v. Girard*, 1 Houst. (Del., 1855), 286; *Wood v. McGuire*, 15 Ga. (1854), 202; *Springer v. Congleton*, 30 Ga. 977; *Lockerman v. McBlair*, 6 Gill (Md.), 177; *Young v. Robertson*, 11 Gill & J. (Md., 1839), 328, 341; *Winslow v. Goodwin*, 7 Met. (48 Mass., 1844), 363, 375; *Merriam v. Simonds*, 121 Mass. 198, 202; *Dixon v. Pickett*, 10 Pick. 517, 518; *Yeaton v. Roberts*, 28 N. H. 459; *Cessna v. Cessna*, 4 Bush (Ky.), 516; *Post v. Herbert*, 27 N. J. Eq. 540; *Chasmar v. Buckin*, 37 N. J. Eq. 415; *Stires v. Van Rensselaer*, 2 Bradf. (N. Y.) 172; *Jenkins v. Freyer*, 4 Paige Ch. (N. Y., 1833), 47, 53; *Lorillard v. Coster*, 5 Paige Ch. (N. Y., 1836), 172; *Mowatt v. Carow*, 7 Paige Ch. (N. Y.,

the children who are mentioned is then living or not, for the rule applies both to a devise to the children of a living person¹ and to a devise to the children of a person who is deceased.²

§ 554. Devises to children where distribution is to be at majority.—Testamentary gifts to children, to be paid to or distributed among them when they shall attain majority, or when they shall marry, are very common. The principles and rules of construction appertaining to such gifts are somewhat inharmonious, and it may, perhaps, with safety be said that each case, where distribution is postponed until the attainment of majority or marriage, depends on its own facts, and on the

1839), 328, 329; *Tucker v. Bishop*, 16 N. Y. 402, 404; *Downing v. Marshall*, 23 N. Y. 366; *Shinn v. Motley*, 3 Jones Eq. (N. C.) 490; *Simpson v. Spence*, 5 Jones Eq. (N. C.) 208, 210; *Myers v. Myers*, 2 McCord (S. C., 1837), Eq. 256; *Gross' Estate*, 10 Pa. St. 361; *post*, § 610.

¹ *Aspinwall v. Duckworth*, 35 Beav. 307; *Garbrand v. Mayot*, 2 Vern. 105; *Singleton v. Gilbert*, 1 Cox, 68; *Viner v. Francis*, 2 Cox, 190, 192; *Devisme v. Mello*, 1 Bro. Ch. R. 537; *Coleman v. Jarrom*, L. R. 4 Ch. D. 165, 170, 25 W. R. 187, 35 L. T. (N. S.) 614; *Shaw v. McMahon*, 4 Dr. & Smale, 431, 438, 440, 35 L. T. (N. S.) 614; *Fell v. Bidolph*, L. R. 10 Com. Pleas, 701, 709; *Young v. Davies*, 2 Dr. & Smale, 167, 172.

² *Loring v. Thomas*, 2 Dr. & Smale, 497; *Viner v. Francis*, 2 Cox, 190, 193. "Where a gift is to a class of individuals in general terms, as to the children of A., and no period is fixed for the distribution of the legacy, the time for distribution will be the death of the testator; and hence, only children born or begotten prior to and *in esse* at that time will be entitled to share in the distribution. But where distribution is, by the terms of the will, to be made at some time subsequent to the death of the testator, the gift will embrace not only all children living at the death

of the testator, but also all those who shall subsequently come into existence before the period of distribution; and, if the bequest is a present bequest, the beneficiaries who are *in esse* at the death of the testator will take vested interests in the fund, but subject to open and let in after-born children, who shall come into being and belong to the class at the time appointed for the distribution. Where the period of distribution is postponed until the attainment of a given age by the children, the gift will apply only to those who are living at the death of the testator and who shall have come into existence before the first child attains the age named, being the period when the fund is first distributable in respect to any one object or member of the class. Where the members of a class take vested interests in a legacy distributable at a period subsequent to the death of the testator, but subject to open and let in after-born children, they take their vested shares subject to the distribution of those shares as the number of the members of the class is increased by future births; and on the death of any of the children previous to the period for distribution, their shares will go to their respective representatives." By *Paige, J.*, in *Tucker v. Bishop*, 16 N. Y. 402, 404.

peculiar language of the will. Where the gift is simply to the children of the testator, or to the children of A., and it is not preceded by a prior life estate, but is stated in general terms to be payable *when* the beneficiaries attain twenty-one years of age, such children only will take who are *in being at the death of the testator*, or who come into existence before the eldest child *who is also living at the death of the testator* shall attain twenty-one years of age, including in each case a child *en ventre sa mere*, and the issue of a child deceased between the death of the testator and the date of distribution.¹

Where the gift is a remainder to the children after a life estate, and is distributable as they attain twenty-one years of age, it will, in the absence of a contrary intention, vest in all those who compose the class of children alive at the death of the testator, and *all those who shall come into existence during the lifetime of the prior life tenant*, and shall also survive until the eldest

¹ Handberry v. Doolittle, 38 Ill. 206; Hubbard v. Lloyd, 6 Cush. (Mass.) 522, 524; Security Co. v. Hartford, 64 Conn. 579; Emerson v. Cutler, 14 Pick. 108, 113; Drake v. Pell, 8 Edw. Ch. (N. Y.) 251; Fleetwood v. Fleetwood, 2 Dev. Eq. (N. C., 1832), 222; Simpson v. Spence, 5 Jones' Eq. (N. C.) 208, 210; Vanhook v. Rogers' Ex'r. 3 Murphey, L. & Eq. (N. C.) 178, 180; Heisse v. Markland, 2 Rawle (Pa.), 274, 275; De Veaux v. De Veaux, 1 Strobb. Eq. (S. C.) 283; Richardson v. Sinkler, 2 Desaus. 127; Andrews v. Partington, 3 Bro. C. C. 401; Evans v. Harris, 5 Beav. 45, 47; Gimblett v. Purton, L. R. 12 Eq. 427, 430 (condemning Bateman v. Gray, L. R. 6 Eq. 215); Garratt v. Weeks, L. R. 20 Eq. 647, 649; Dean v. Dean (1891), 3 Ch. 150; Dawson v. Oliver-Massay, L. R. 2 Ch. D. 753; Robley v. Ridings, 11 Jur. 813; Gillman v. Daunt, 3 Kay & J. 48; Ringrose v. Bramham, 2 Cox Ch. R. 384, 387; Peyton v. Hughes, 7 Jurist, 311; Storrs v. Benbow, 2 My. & K. 46. When one or more of the children shall have attained twenty-one at the death of the testator, the class is ascertained as of that date, and

the legacy, if immediate, should be paid to them at once. Cf. ante, § 508. The reader should distinguish clearly between a gift to children individually or as a class, to be paid *when* they attain majority or marry, and a gift to children as individuals or as a class *if* they reach majority or marry, with a gift over in case they do not. The former is a vested devise descendible and devisable; the latter is a mere contingent executory gift. A legacy to the children of A., to be paid as they severally attain the age of twenty-one, vests at the death of the testator in the children of A. *then living*, and in all his after-born children as soon as *they are born*. Parker v. Leach, 66 N. H. 416, 31 Atl. R. 19. Where the devise to the children whom A., the parent, *may leave*, is to go over in case none of them shall reach twenty-one, and in case none shall leave issue which shall attain that age, the children whom A. *leaves him surviving* take a contingent interest, which becomes vested only on each reaching his majority. Boutelle v. City Bank, 18 R. L. 177, 26 Atl. R. 53.

child who was living *at the death of the testator* shall attain the age of twenty-one years. But this rule will yield before an expression of a contrary intention, as where the remainder is given to the children who *may survive the* life tenant, to vest in them as they attain the age of twenty-one.¹ So, where the devise was to A. for life, with a remainder to the children of B. who may be living at the death of the testator, or who may be born afterwards, and who shall attain the age of twenty-one, *and no child who attains that age to be excluded*, it was held, in spite of the reference to children "*born afterwards*," that the class was to be ascertained *either* at A.'s death or when the eldest child of B. living at the testator's death shall attain the age of twenty-one, whichever event happens *last*, and those children who were born after *both* events were excluded.² And the rule that where any child has attained his majority at the death of the testator, no child born subsequently is let in, is applicable not only to immediate gifts, but to gifts to children after a life estate.³ Some exceptions to this rule by which children born

¹ Winslow v. Goodwin, 7 Met. (48 Mass., 1844), 363, 375; Collin v. Collin, 1 Barb. Ch. (N. Y., 1845), 636; Shattuck v. Stedman, 2 Pick. (19 Mass.) 467, 470; Ward v. Tomkins, 30 N. J. Eq. 3; Vanhook v. Rogers, 3 Murph. L. & Eq. (N. C.) 178; Buckley v. Read, 15 Pa. St. 85; Male v. Williams, 48 N. J. Eq. 33, 21 Atl. R. 854; Williams v. Williams, L. R. 6 Ch. App. 782; Hagger v. Payne, 23 Beav. 474, 481; Congreve v. Congreve, 1 Bro. C. C. 530. Cf. Cropley v. Cooper, 7 D. C. 226, 19 Wall. 167. The construction which vests the legacy when the *eldest* child living at the testator's death attains twenty-one avoids the inconvenience in some cases of keeping open the estate in the case of a devise of a legacy to the children of A., who is *living at the death of the testator*. If a gross sum is given to the children of A., to be paid in equal shares to *each one at twenty-one*, there is no inconvenience in postponing the vesting during the whole life of A., for there is nothing to do but set aside a gross

sum until the eldest of all his children born at any time attains twenty-one, and then divide among all his children. But where there are distinct legacies, payable *when* each child attains twenty-one, to follow out this method and permit children to take who are born *after* the eldest attains twenty-one would keep the matter open until the death of the parent; for no one can know how many legacies are to be paid until he knows how many children there are, and this cannot be known until the parent's death.

² Parsons v. Justice, 34 Beav. 598. See Ringrose v. Bramham, 2 Cox Ch. 384.

³ Clarke v. Clarke, 8 Sim. 59. If a money legacy be given to children as a class, and directed to be paid to each of them at the age of twenty-one, and there are no children who survive the testator, the legacy will lapse. Rogers v. Mutch, L. R. 10 Ch. D. 25.

after the eldest child attains majority are excluded may be noted. If the support and maintenance of all the children are provided for until they shall severally attain majority, which of course would extend the final distribution until *after the eldest* had attained his majority, all the children, including those born after this event, will be included in the class.¹ But the mere fact that trustees are permitted to advance a portion of his share to any child, or that on a child's death his share goes to the survivor or survivors, does not vary the rule.² So, even though the gift may be void for remoteness of vesting, as it would be in the case of a gift to the children of A., who is alive at the testator's death, to vest in them when *the youngest* shall attain the age of twenty-two, the rule would still apply.³

§ 555. Construction of a clause directing distribution when the youngest child shall attain the age of twenty-one.—

Where the distribution of an immediate gift among the children of the testator, or among the children of another person, is directed in express terms when the *youngest* of such children shall attain the age of twenty-one, the question at once arises whether the testator refers to the majority of the *youngest one of those children who are living at the date of his death, or whether he means the youngest child of all who may be born, whether before or after his death.* Where the testator is speaking of the youngest of his *own children*, he, of necessity, will be presumed to mean that one who is the youngest of the class at

¹ Iredell v. Iredell, 25 Beav. 485, 491, 492; Bateman v. Gray, L. R. 6 Eq. 215. A devise to nephews and nieces, or to any other class of relations, after a life estate, to be paid to them at majority or on marriage, will include all those coming into being during the life estate. Balm v. Balm, 3 Sim. 492, 493; Shuttleworth v. Grieves, 4 My. & Gr. 35; Cort v. Winder, 1 Colly. 320, 321.

² Titcomb v. Butler, 3 Sim. 417; Balm v. Balm, 3 Sim. 492; Matchwick v. Cook, 3 Ves. 609, 611.

³ Leake v. Robinson, 2 Mer. 363, 383; Arnold v. Congreve, 1 R. & My. 209; Comport v. Austen, 12 Sim. 218. Where a legacy was given to B., who

is a son of A., but if he (B.) shall die under the age of twenty-one, then to A.'s other children arriving at such age, all the other children living at the death of the testator, or born before the eldest child then living shall attain his majority, are entitled, whether born before or after the death of B. Haughton v. Harrison, 2 Atk. 329. So where there is a remainder over to the children of A., after a life estate in one of them, on his death unmarried all the children will take, whether born before or after the death of the life tenant. Ellison v. Airey, 1 Ves. 111; Stanley v. Wise, 1 Cox, Ch. R. 432.

his death, including a child *en ventre sa mere*. Thus, where the testator leaving five minor children provided that there should be no division of his estate until *his youngest child should attain his majority*, it was held that he did not mean his youngest child, whenever born, that should in fact attain his majority, but he meant the youngest child who was living at his death.¹ Where the testator gives to the children of his son, "*born or to be born*," a fund to accumulate until the *youngest surviving* of these children shall have attained the age of twenty-one, it would seem that, by including children "born" as well as those "to be born," he means the youngest one of his son's children who are living at the date of the execution of the will, and not the youngest of any who might be subsequently born to his son, and who might survive him.² So where a remainder after a life estate to A. was devised for the support of *his children*, to be divided among them when the *youngest child* attained the age of twenty-one, it was held that, where A. had no children at the death of the testator, but after the death of the testator, on the death of his wife, married again, the youngest child referred to meant those of the subsequent marriage.³ But generally, where the majority of the youngest child is construed as meaning that child who is the youngest of the testator's children at the date of his death, no child born after that child shall attain his majority will be capable of taking.⁴ A trust which is to continue during the life of the "youngest grandchild" of several named, for the benefit of grandchildren living at the death of the testator or *those subsequently born*, and, on the majority of the *youngest grandchild*,

¹ *Armstrong v. Crapo*, 72 Iowa, 604, 34 N. W. R. 437; *Curd v. Curd* (Ky., 1887), 4 S. W. R. 226; *Earnshaw v. Daly*, 1 App. D. C. 218; *Hocker v. Gentry*, 3 Metc. (60 Ky.) 463; *Meyer v. Eisler*, 29 Md. (1868), 28; *Simpson v. Cook*, 24 Minn. 180; *Butler v. Butler*, 3 Barb. Ch. (N. Y.) 304; *Burke v. Valentine*, 52 Barb. (N. Y.) 412, 415; *Galway v. Bryce*, 30 N. Y. S. 985, 10 Misc. R. 255; *In re Sand's Will*, 3 N. Y. S. 67, 1 Con. Sur. 259; *Manwaring v. Beavor*, 8 Hare, 44; *Perry v. Rhodes*, 5 Jones' Eq. (N. C.) 140, 142;

Bateman v. Foster, 1 Coll. 118, 126; *Bailsford v. Heyward*, 2 Des. (S. C., 1805), Eq. 18. Cf. *Meikle's Estate*, 20 N. Y. S. 88.

² *In re McBride's Estate*, 25 Atl. R. 513, 152 Pa. St. 192, 31 W. N. C. 333; *Appeal of Real Estate, Title, Ins. & Trust Co.*, 152 Pa. St. 202, 31 W. N. C. 333.

³ *Cogan v. McCabe*, 52 N. Y. S. 48, 23 Misc. R. 739.

⁴ *Deighton's Trust*, L. R. 2 Ch. D. 783; *Selby v. Whittaker*, 26 W. R. 117, L. R. 6 Ch. D. 239.

to the grandchildren *then living*, means on the majority of the youngest grandchild alive at the date of the will.¹ Where the testator devised his farm to be divided when a life tenant should die, or when *his* youngest child should come of age, he meant the youngest child named in his will or living at his death, and not the youngest child of those subsequently born to the life tenant.²

§ 556. **Testimony to prove the age of a legatee.**—It may be useful in this connection to consider some of the rules of proof which are invoked where the attainment of majority or other age is in issue. In computing the age of a person the day of his birth is included, so that he will attain his majority on the day preceding the twenty-first anniversary of his birth. Thus, if it is shown that he was born on the 22d day of May, 1877, he would be twenty-one years of age on the 21st day of May, 1898, and, as the law disregards in its computation fractions of a day, he will be regarded as being twenty-one years of age at the first moment of that day.³

A certified copy of the official registry of births provided for by statutory regulations may be employed to prove the date of birth.⁴ And the physician or midwife who was present at the birth is competent to testify to the fact and date.⁵ When his recollection is faint as to the date, an original contemporaneous entry made by him in his accounts or in his diary is, if he was present at the birth, competent evidence, provided he is able to swear that it was correctly made at the time.⁶ If it shall appear that the physician who at-

¹ *Roe v. Vingut*, 1 N. Y. S. 914, 21 Abb. N. C. 404.

² *Arnold v. Arnold*, 41 S. C. 291, (1893), 19 S. E. R. 670. Where the partition of land devised to the children of the testator and to the children of a married daughter share and share alike was to be postponed until the youngest child of the testator should attain the age of twenty-one, and the daughter died prior to that time, leaving one child surviving, the distribution may take place immediately, for that child's share vests at once, as there can be no more children to divide

with him. *Moore v. Schindelette*, 102 Mich. 612 (1894), 61 N. W. R. 62.

³ 1 Bl. Com. 463; 2 Kent, 233; *Herbert v. Torball*, 1 Siderfin, 162; *Rayn.* 84; *Anon.*, 1 Salkeld, 44; *Howard's Case*, 2 Salkeld, 625. Cf. *Lester v. Garland*, 15 Ves. 257.

⁴ *Shutesbury v. Hadley*, 133 Mass. (1882), 242; *Underhill on Evid.*, § 142, citing cases.

⁵ *Beates v. Retallick*, 11 Pa. St. (1849), 288.

⁶ *Higham v. Ridgway*, 10 East, 109; *Guy v. Mead*, 22 N. Y. 462; *Heath v. West*, 26 N. H. 191.

tended the birth is dead, or if his presence as a witness cannot be procured because he is insane or out of the jurisdiction, an entry made by him in a book which he was accustomed to keep in the performance of his professional duty is evidence of the date of birth.¹ Though a certificate of the baptism of a child is, of itself, inadmissible as direct evidence to show the date of his birth, though it may state the date,² it is admissible to prove that the person was in being at its date.³ The person whose age is in question may testify to his own age, so far as his knowledge is based upon the reputation which is current in his family.⁴ Whether or no the age may be determined by inspection has not been positively determined. Some courts permit a person's age to be determined by inspection, even in criminal cases.⁵ Other authorities, however, have determined that such proof is incompetent, and that a court cannot determine the age of a person except upon oral evidence.⁶ What is commonly called pedigree evidence is admissible to prove the facts of the family history, such as the birth, age, death or marriage of persons.⁷

§ 557. The operation of the words "living," "then living," and "surviving," in determining when class of children is to be ascertained.—The general rule that all children who are *in esse* at the death of the testator, and all those who are subsequently born during the existence of the prior estate, shall constitute the class who are to take after its determination, is subject to an expression of a contrary intention on the part of the testator. The tendency of all the cases in which words of survivorship are used is to refer them to as early a period as possible. Very often the word "surviving," or "living," which is synonymous with it when it is used in a gift following a life estate, as to A. for his life with remainder to *my "surviving" children*, will be construed to mean such as

¹ *Arms v. Middleton*, 23 Barb. (1857), 571. (1876), 296; *Houlton v. Manteuffel* (Minn., 1893), 53 N. W. R. 541.

² *Clark v. Trinity Church*, 5 W. & S. (Pa.) 266, 269; *Blackburn v. Crawford*, 3 Wall. (70 U. S.) 189; *Lavin v. Aid Soc.*, 74 Wis. 349. ⁵ *State v. Arnold*, 13 Ired. (35 N. C.) Law, 184; *Keith v. N. H. & N. R. Co.*, 140 Mass. 175.

³ *Kennedy v. Doyle*, 10 Allen (92 Mass.), 161. ⁶ *Stephenson v. Arnold*, 28 Ind. 278; *Bird v. State*, 104 Ind. 384.

⁷ *Underhill on Evid.*, § 53.

⁴ *Cheever v. Congdon*, 34 Mich.

are surviving at the death of the testator.¹ The children of the testator who are living at *his death* take a remainder, which vests in them at once; and, in case of the death of any of them before the death of the life tenant, his or her share descends to his or her heirs or personal representatives, and is also devisable. The same rule applies to the word "surviving" where it is employed in a devise to the "surviving" or "living" children of A., whether the gift is immediate or whether it is only to be distributed after the termination of a prior life estate.² Thus, where a devise was to A. for life, with remainder to the "surviving" children of A., to be equally divided between them, the remainder vested only in the children of A. who were living at the death of the testator, and was not subject to open and let in after-born children of A.³

The testator may, by apt words, clearly show that he intends by the use of the word "surviving" or "living" to refer to the termination of a prior estate created by him.⁴ No particular form of language on his part is necessary to show that he means to postpone the vesting in the children as a class to those only who survive the termination of the prior estate. Where he gives property to A. for his life, with a remainder to his children who are "*living at his death*,"⁵ or to his children "*then living*,"⁶ or to the children "*then surviving*,"⁷ or uses other language which clearly shows that he intends only those to

¹ *Grimmer v. Friedrich*, 45 N. E. R. 493, 164 Ill. 245; *Union Mt. Ass'n v. Montgomery*, 70 Mich. 587, 595; *Porter v. Porter*, 50 id. 456; *Smith v. Black*, 29 Ohio St. 488, 498; *Anderson v. Smoot*, Speer (S. C.), Eq. (1844), 312; *Ballard v. Connors*, 10 Rich. Eq. (S. C., 1859), 389, 392; *Swinton v. Legare*, 2 McCord Eq. (S. C., 1822), 440; *Friereson v. Van Buren*, 7 Yerg. (15 Tenn.) 606, 613; *Satterfield v. Mayes*, 11 Humph. (30 Tenn.) 58, 60; *Wornock v. Smith*, 11 Humph. (Tenn.) 478; *In re Hubbert's Estate*, 6 Pa. Dist. R. 96.

² *Stone v. Lewis' Adm'r*, 84 Va. 474, 5 S. E. R. 282; *Eberts v. Eberts*, 42 Mo. 404.

³ *Lombard v. Willis*, 147 Mass. 13 (1888), 16 N. E. R. 737; *Reams v.*

Spann, 26 S. C. 561, 564 (1881), 2 S. E. R. 412.

⁴ *Ante*, § 349.

⁵ Thus, to illustrate. Where the remainder was to the five children of C. and to those she may hereafter have, who may be *then living*, that is, at her death, it is contingent, and the children living at her death take all, to the exclusion of the children of a child who died during C.'s life. *Shanks v. Mills*, 25 S. C. 358, 362; *Ringquist v. Young*, 112 Mo. 25, 20 S. W. R. 159. Cf. *Smith v. Secor*, 157 N. Y. 402, 52 N. E. R. 179.

⁶ *Haskins v. Tate*, 25 Pa. St. (1855), 249.

⁷ *Wood v. Bullard*, 25 N. E. R. 67, 151 Mass. 324, *Holcomb v. Lake*, 24 N. J. L. 686, 689.

take who are living at the death of the life tenant, those in existence at that date will form the class of children among whom the property is to go, to the exclusion of the heirs of those children who have died in the interval between the death of the testator and the death of the life tenant whose shares go to the survivors. This is true whether the limitation is to the children of the life tenant,¹ or to the children of the testator.² But the testator may, in providing for those children who survive the termination of the life estate, also expressly direct that the issue or heirs of any children who may die during the existence of the life estate shall take their parent's share.³ But

¹ *Bethea v. Bethea* (Ala., 1897), 23 S. R. 501; *Wilhelm v. Caldwell* (Iowa, 1897), 71 N. W. R. 214; *Hempstead v. Dickson*, 20 Ill. (1861), 193, 195; *Spear v. Fogg*, 87 Me. 132, 139; *Olney v. Hull*, 21 Pick. (38 Mass.) 311; *Thompson v. Ludington*, 104 Mass. 193; *Howland v. Howland*, 11 Gray (77 Mass.), 469; *Hill v. Rockingham*, 45 N. H. 270; *Van Tilburgh v. Hollinshead*, 14 N. J. Eq. (1861), 32, 35; *Slack v. Bird*, 23 N. J. Eq. 238; *Williams v. Chamberlain*, 10 N. J. Eq. 373; *Paget v. Melcher*, 156 N. Y. 399; *In re Allen*, 151 N. Y. 243, 45 N. E. R. 554; *Smith v. Black*, 29 Ohio St. 488, 498; *Haskins v. Tate*, 25 Pa. St. 249; *Durant v. Nash*, 30 S. C. 184, 9 S. E. R. 474; *Kansas C. L. Co. v. Hill*, 3 Pickle, 589; *Schoppert v. Gillman*, 6 Rich. (S. C.) Eq. 83; *Dwight v. Eastman*, 62 Vt. 398, 20 Atl. R. 398.

² *Ringquist v. Young*, 112 Mo. 25, 34, 20 S. W. R. 159; *Coveny v. McLaughlin*, 20 N. E. R. 165, 148 Mass. 576, 577; *Den v. Sayre*, 2 N. J. L. 598; *Seddel v. Wills*, 20 N. J. L. 223; *Ayscough v. Savage*, 13 W. R. 373, 374; *Drew v. Drew*, 23 W. R. 314; *Wellock v. Ostle*, 21 W. R. 118, 27 L. T. (N. S.) 481; *Harvey v. Harvey*, 3 Jur. 949; *Hetherington v. Oakman*, 2 Y. & C. C. 299; *Gill v. Barrett*, 29 Beav. 372, 375.

³ *Scott v. Guernsey*, 48 N. Y. 106. A remainder to "children now living,

or who may be living at the decease of the life tenant," is vested in those who are alive at the death of the testator. *Rood v. Hovey*, 50 Mich. (1883), 595. A remainder to the children of A. and B., and "in the event of their death to the children living at the time of their death," vests only on the death of both A. and B. and in children then *in esse*. *Appeal of Commonwealth Title, Ins. & T. Co.*, 24 W. N. C. 35, 126 Pa. St. 223 (1889). Where one of the conditions of a remainder to children is that they shall survive the life tenant, who is their parent, the remainder is not only contingent, but is non-transferable, and a purchaser of the remainder under execution takes no title. *Roundtree v. Roundtree*, 26 S. C. 450 (1887), 2 S. E. R. 474; *Haward v. Peavey*, 128 Ill. 430, 21 N. E. R. 503; *Putnam v. Story*, 132 Mass. 207, 211; *Nash v. Nash*, 12 Allen (Mass.), 845; *Dunn v. Sargent*, 101 Mass. 336; *Robinson v. Palmer* (Mass.), 38 Atl. R. 10; *Rosenau v. Childress*, 111 Ala. 214, 20 S. R. 95. Where the remainder is to children who *are alive at the death of the life tenant*, with a proviso that the issue of a deceased child shall take the parent's share, the issue take as purchasers and not by descent from their parent. *Dunlap v. Fant*, 74 Miss. 197, 20 S. R. 874.

a provision for the children of the testator equally, who may then be living, that is to say, at the termination of the life estate, and to their heirs and assigns forever, does not include the heirs or personal representatives of those who die during the life estate, for the words "heirs" and "assigns" are not words of substitution, but point to the character of the estate which the surviving children shall take.¹ So where the devise was expressly to the children of B. at the death of A., or to the issue of deceased children as shall then be living, only children living at the death of the life tenant were permitted to take to the exclusion of the issue of those who died during the life estate.²

§ 558. **When children as a class are to be ascertained in the case of a remainder.**—Where the distribution to or among children is to come *after a prior life estate*, a different rule is applicable than where it is immediate; for if the distribution or the possession of the property devised in remainder to children is not to be made or enjoyed until a period has elapsed subsequent to the death of the testator, a gift to children as a class will embrace not only all children who are living at the testator's death, and compose the class at that time, but also all who are born before the period of distribution arrives. The rule as thus stated is applicable to a remainder to the children of some person other than the testator himself. Thus, suppose the testator shall give property to A. for *his life*, and after his death to the children of A. in remainder; all the children of A. who are living at the death of the testator, and all of A.'s children who are born during his life, will constitute the class at the period of distribution. And the same rule would apply where the gift is of a remainder to the children of B. at the death of A., or the children of the testator after a prior life estate to be enjoyed by his widow. If the gift of the remainder

¹ Patchen v. Patchen, 121 N. Y. 432, 24 N. E. R. 695; Hills v. Barnard, 25 N. E. R. 96, 152 Mass. 67; Cooper v. Macdonald, L. R. 16 Eq. 258. *Cf. post*, § 606.

² Brown v. Williams, 5 R. L. (1857), 309, 318; Harvey v. Harvey, 8 Jur. 949. A devise to such children of A. who are living at his death will go

to those, irrespective of the fact that the death occurs during the life-time of the testator. Allen v. Callow, 3 Ves. 289; Blass v. Helms, 93 Tenn. 166, 23 S. W. R. 166; Wainwright v. Sawyer, 150 Mass. 168, 22 N. E. R. 885; Smith v. Secor, 157 N. Y. 402, 52 N. E. R. 179. Compare the cases cited on "Survivorship," under §§ 341-355.

is a present gift, that is to say, if it vests a present interest, the possession only being postponed, all the children take who are *in esse* at the death of the testator, and they will take vested interests, subject to open and let in after-born children who come into being during the existence of the prior life estate; and both classes will compose the class at the time appointed for distribution. And if any child in whom the remainder has become vested dies during the life tenancy, his or her issue, if any survive until the time of distribution, will take *per stirpes* the share of the parent.¹

¹ Bull v. Bull, 8 Conn. 49; Beckley v. Leffingwell, 17 Atl. R. 766, 57 Conn. 163; Johnes v. Beers, 18 Atl. R. 100, 57 Conn. 295; Nelson v. Pomeroy, 29 Atl. R. 534, 64 Conn. 257; De Vaughn v. McLeroy, 10 S. E. R. 211, 82 Ga. 687; Siddons v. Cockrell, 131 Ill. 653, 23 N. E. R. 586; Kelly v. Gonce, 49 Ill. App. 82; Kilgore v. Kilgore, 26 N. E. R. 56, 127 Ind. 276; Heilman v. Heilman, 28 N. E. R. 310, 129 Ind. 59; Moores v. Hare (Ind., 1896), 43 N. E. R. 870; Burnside v. Wall, 9 B. Mon. (48 Ky.) 321; Arnold v. Arnold, 11 id. 93; Phillips v. Johnson, 14 id. 172; Lynn v. Hall (Ky., 1897), 43 S. W. R. 402; Mercantile Bank v. Ballard, 83 Ky. 481; Young v. Robinson, 11 Gill & J. (Md., 1840), 328; Waters v. Waters, 24 Md. 430, 446; Taylor v. Mosher, 29 Md. 443, 455; Barnum v. Barnum, 42 Md. 251, 310; Straus v. Rost, 67 Md. 465, 10 Atl. R. 74; Devecmon v. Shaw, 16 Atl. R. 645, 70 Md. 219; Demill v. Reid, 17 Atl. R. 1014, 71 Md. 175; Dulany v. Middleton, 72 Md. 67, 19 Atl. R. 146; Cox v. Handy, 78 Md. 108, 27 Atl. R. 227; Winslow v. Goodwin, 7 Met. (Mass.) 381; Parker v. Converse, 5 Gray (71 Mass.), 336; Shattuck v. Stedman, 2 Pick. (Mass.) 468; Moore v. Weaver, 16 Gray, 305; Weston v. Foster, 7 Met. (48 Mass.) 297, 299; Bowditch v. Andrew, 8 Allen (91 Mass.), 342; Houghton v. Kendall, 7 Allen (Mass.), 72, 75; Merriam v. Simonds, 121 Mass. 198, 202; Dorr v. Lovering,

147 Mass. 530, 18 N. E. R. 412; Worcester v. Worcester, 101 Mass. 132; Morrill v. Phillips, 142 Mass. 240; Dodd v. Winship, 144 Mass. 461, 11 N. E. R. 588; Crosby v. Crosby, 5 Atl. R. 907, 64 N. H. 77; Van Giesen v. Howard, 7 N. J. Eq. 462; Feit's Ex'rs v. Vantatta, 21 N. J. Eq. 84, 86; Ward v. Tomkins, 30 N. J. Eq. 3, 4; Parker v. Hover, 42 N. J. Eq. 559, 9 Atl. R. 217; Rhodes v. Shaw, 43 N. J. Eq. 430, 11 Atl. R. 116; Van Giesen v. White, 53 N. J. Eq. 1, 30 Atl. R. 331; Cook v. McDowell, 53 N. J. Eq. 351, 30 Atl. R. 24; Thomae v. Thomae (N. J., 1889), 18 Atl. R. 355; Huber v. Donahue, 49 N. J. Eq. 125, 23 Atl. R. 495; Budd v. Haines, 52 N. J. Eq. 488, 29 Atl. R. 170; Hanan v. Osborn, 4 Paige (N. Y., 1834), 336, 342; Van Vechten v. Pearson, 5 id. 512; Kurst v. Patton, 4 Dem. (N. Y.) 130; Carpenter v. Schermerhorn, 2 Barb. Ch. 314; Williams v. Conrad, 30 Barb. 524; Jenkins v. Freyer, 4 Paige, 53; Tucker v. Bishop, 16 N. Y. 402, 404; Teed v. Morton, 60 N. Y. 506; Stevenson v. Lesley, 70 N. Y. 512, 517; Nelson v. Russell, 31 N. E. R. 1008, 135 N. Y. 137; Bowditch v. Ayrault, 33 N. E. R. 1067, 138 N. Y. 222; Campbell v. Stokes, 36 N. E. R. 811, 142 N. Y. 23; Nathan v. Hendricks, 34 N. Y. S. 1016, 87 Hun, 483; In re Haer, 41 N. E. R. 702, 147 N. Y. 348; Losey v. Stanley, 147 N. Y. 560, 42 N. E. R. 8; In re Seaman's Estate, 147 N. Y. 69, 41 N. E. R. 401; In re Tienken, 131 N. Y. 391, 30 N. E. R.

A devise to the children of B., after a prior life estate in A., vests in the children of B. who are living at the death of the testator as a class, subject to being diminished by the death of any of them, and to open and let in those born during the life-

109, 15 N. Y. S. 470, 60 Hun, 417, 27 Abb. N. C. 151; Balen v. Youmans, 20 N. Y. S. 656; Smith v. Lawrence, 21 N. Y. S. 379, 66 Hun, 362; Balen v. Jacquelin, 22 N. Y. S. 193, 67 Hun, 311; In re Collins, 24 N. Y. S. 226, 70 Hun, 273; In re Hall's Estate, 33 N. Y. 418, 11 Misc. R. 433; Coggins v. Flythe, 18 S. E. R. 96, 113 N. C. 102; Vanhook v. Rogers, 3 Murphey L. & Eq. (7 N. C.) 178; Meares v. Meares, 4 Ired. L. (26 N. C., 1844), 192, 196; Robinson v. McDiarmid, 87 N. C. 455; Mining v. Batdorf, 5 Pa. St. 503; Herr's Estate, 28 Pa. St. 467; Wunder's Estate, 13 Phila. 409; Appeal of Pennsylvania Co. (Pa., 1887), 10 Atl. R. 130; In re Thoman's Estate, 29 Atl. R. 84, 161 Pa. St. 444; Snyder's Estate, 180 Pa. St. 70; Spencer v. Greene, 17 R. L. 727, 24 Atl. R. 742; Chafee v. Maker, 24 Atl. R. 773, 17 R. L. 739; McGregor v. Toomer, 2 Strobb. (S. C.) L. 51; Crossby v. Smith, 3 Rich. Eq. (S. C.) 244; Wessenger v. Hunt, 9 id. 459; Bridgewater v. Gordon, 2 Sneed (35 Tenn., 1855), 5; Alexander v. Walsh, 3 Head (40 Tenn.), 493; Owens v. Dunn, 85 Tenn. 131; McClung v. McMillan, 1 Heisk. (Tenn.) 655; Franklin v. Franklin, 91 Tenn. 119; Rowlett v. Rowlett, 5 Leigh (Va., 1834), 20, 28; Hansford v. Elliott, 9 Leigh (Va., 1837), 79, 94; Hamletts v. Hamletts' Ex'r, 12 Leigh (Va.), 350; Toole v. Perry, 80 Va. 681, 7 S. E. R. 118; Martin v. Kirby, 11 Gratt. (Va.) 67, 71; Stone v. Nicholson, 27 id. 16, 18; Chapman v. Chapman, 90 Va. 409, 18 S. E. R. 913; Scott v. West, 63 Wis. 529, 564; Emmet v. Emmet, 49 L. J. Ch. 21, 28 W. R. 401; Clarke's Estate, 3 De Gex, J. & S. 111; Stewart v. Sheffield, 13 East, 526; Faulding's Trusts, 26 Beav. 263;

Moore v. Bailey, 43 L. T. (N. S.) 730, 29 W. R. 171; Comberbach v. Perryn, 3 T. R. 484; Shortbridge v. Creber, 5 Barn. & Cress. 866, 8 Dow. & Ry. 718; Walker v. Shore, 15 Ves. 122, 124; In re Hiscoe, Hiscoe v. Waite, 48 L. T. (N. S.) 510; Turner v. Hudson, 10 Beav. 222, 224; Viner v. Francis, 2 Bro. C. C. 658; Hill v. Chapman, 1 Ves. 405; Doe v. Martin, 4 T. R. 89; Osbury v. Bury, 1 Ball & Beat. 53; Middleton v. Messenger, 5 Ves. 136; Oppenheim v. Henry, 10 Hare, 441; Baldwin v. Rogers, 3 D. M. & G. 649; Locke v. Lambe, L. R. 4 Eq. 372; Gimblett v. Purton, L. R. 12 Eq. 427; Clarke v. Clarke, 8 Sim. 59; Whitebread v. Lord St. John, 10 Ves. 152. Where a testator devises a remainder among the children of his son, share and share alike, and the son has four children at the death of the testator, they will take a vested share in the remainder, though only two survive the son. Adams v. Woolman, 26 Atl. R. 451, 50 N. J. Eq. 516. A devise to A. for life, then to B. for life, and a remainder to B.'s children, creates a remainder in B.'s children living at the death of the testator, which is vested and may be assigned at any time during the lives of the two life tenants. Loring v. Carnes, 19 N. E. R. 343, 148 Mass. 223. A provision by which land is to be divided among children after the decease of the life tenant creates a vested remainder in the children. In re Hurlbutt's Estate, 40 N. E. R. 226, 145 N. Y. 535. A remainder to living children or their heirs has been held to create a vested remainder which can be devised or assigned. Ramsay v. De Remer, 20 N. Y. S. 143, 65 Hun, 212; Cote v. Von Bonnhorst, 41 Pa.

time of A., but not to include any of the children of B. born after the death of the life tenant.¹ A gift to all the children A. may now have, or may hereafter have, to be distributed to them after the death of B., will include all of A.'s children who are living at the testator's death, and those who are born during the life-time of the life tenant, but not those born afterwards.² And generally, a child of the testator who is himself a legatee for *his* life has the right to claim as one of a class under a devise of the residue to the children of the testator.³ And *his* issue may claim as purchasers where a remainder in the same property in which he had a life estate is devised to the testator's children and the issue of deceased children.⁴

The rule that a future gift to children will include all who compose the class at the death of the testator, and also those who come into existence during the prior estate, applies to an estate which is to vest after a determinate period,⁵ and to one which is to terminate upon the bankruptcy of the life tenant.⁶ The fact that there is a gift over upon the decease of any of the children who are named as remainderman, under his or her majority, does not alter the application of the rule.⁷ And where the life tenant has the power to appoint to his children at the termination of the life estate, he may include all those living at the death of the testator and those coming into being during his life.⁸

§ 559. Gifts to children "born" or "to be born."—Children born after the making of the will are usually presumed to be included, where the gift is payable immediately to the children

St. (1861), 243; *Hovey v. Nellis*, 57 N. W. R. 255, 98 Mich. (1893), 374; *Licht v. Licht*, id.; *Cooper v. Hepburn*, 15 Gratt. (Va.) 551, 558.

¹ *Ayton v. Ayton*, 1 Cox, Ch. R. 327; *Nodine v. Greenfield*, 7 Paige Ch. (N. Y., 1839), 544, 548; *Paul v. Compton*, 8 Ves. 375, 380.

² *Pickett v. Southerland*, 1 Winst. (60 N. C., 1864), 67; *Ward v. Cooper*, 69 Miss. 789, 794, 13 S. R. 827; *Shinn v. Motley*, 3 Jones' Eq. (N. C.) 490, 494.

³ *Jennings v. Newman*, 10 Sim. 219.

⁴ *Bell v. Smalley*, 18 Atl. R. 70, 45 N. J. Eq. 478.

⁵ *Ballard v. Ballard*, 18 Pick. (35 Mass.) 41; *Bailey v. Wagner*, 2 Strobb. (S. C., 1848), Eq. 1; *Meyer v. Eisler*, 29 Md. 28.

⁶ *In re Smith*, 2 John. & Hem. 594, 600; *In re Aylwin's Trusts*, L. R. 16 Eq. 585, 590.

⁷ *Berkeley v. Swinburne*, 16 Sim. 275, 286, L. R. 13 Ch. D. 489, 491, 492; *Davidson v. Dallas*, 14 Ves. 576; *Kevern v. Williams*, 5 Sim. 171.

⁸ *Harvey v. Stracey*, 1 Drewry, 73, 122.

of A. This presumption is applicable where the testator gives to his own children *simpliciter*.¹

Sometimes a testator qualifies a devise to children by the words "born," or "to be born," or "begotten" or "to be begotten." The meaning of these words depends upon the character of the devise. Where the gift vests immediately at the testator's death, and there are no children then in existence, it will go to children who may be born *at any time thereafter* before final distribution.² And where there are children living at that date, a provision for children "*born*" or "*to be born*" will include *all* children, whether born *before or after* the death of the testator, provided they shall be born prior to the time when the estate is to vest in possession or to be distributed.³ But none born *after* the period of distribution or vesting has arrived will be permitted to take as "children born or to be born," unless the will provides for such children "as shall hereafter be born during the life of their parents," when the devise will include all children who answer this description, whether born before or after the period of distribution.⁴

In the absence of anything in the will to the contrary, the words "to be born," "to be begotten," "which shall be born," or "which he shall have," are *not* presumed to refer exclusively to children that are born *after the date of the will*, but will include as well all those who answer to the description of children at the date of the execution of the will.⁵ Accordingly, where there was a devise of a remainder to the "children of A. and B. *lawfully to be begotten*," all children living at the date of the will, with those afterwards begotten, were permitted to take, for the words "lawfully to be begotten," or "to be born," have ordinarily a more direct reference to the root of descent, and to the legitimacy of birth, than to the time,

¹ Matchwick v. Cock, 3 Ves. 609, 611; Freemantle v. Taylor, 15 Ves. 363; Butler v. Lowe, 10 Sim. 317.

² Hoteling v. Marsh, 132 N. Y. 29, 30 N. E. R. 249; Weld v. Bradbury, 2 Vernon, 705; Burke v. Wilder, 1 McLeod (S. C.) Eq. 551.

³ Mogg v. Mogg, 1 Mer. 654, 658; Gooch v. Gooch, 14 Beav. 565, 3 D. M. & G. 366; Napier v. Howard, 8 Ga. 202;

Eddowes v. Eddowes, 30 Beav. 603; Whitbread v. Lord St. John, 10 Ves. 152; Heisse v. Markland, 2 Rawle (Pa.), 275. Cf. Ringrose v. Bramham, 2 Cox, 384.

⁴ Hoteling v. Marsh, 132 N. Y. 29, 30 N. E. R. 249; Scott v. Scarborough, 1 Beav. 156.

⁵ Prowitt v. Rodman, 37 N. Y. 42.

whether past or future, at which the birth is to take place.¹ But the context of the will may clearly show that a provision for children "that may be born," or "to be born," is exclusively applicable to future-born children, to the exclusion of those who may be in existence at the date of the execution of the will.² So, where the legacy was to the children "*that hereafter may be born to A.*," the rule that all children born to A., whether born before or after the death of the testator, are included, may not apply, for it was the intention of the testator, evidently, to confine the expression to such as may be born to A. prior to the death of the testator. Under a power to B. to appoint among the children of A. "*as may hereafter be born*," B. is confined in his selection to the children of A. born after the execution of the will, and in his (B.'s) own life-time. B. cannot execute the power in favor of children of A. who are born after B.'s death.³

§ 560. **Distribution amongst children, when to be per capita.**—In the case of a legacy to the children of the testator as a class, or to the children of A. as a class, *simpliciter*, whether the vesting is immediate or remote, they will take *per capita*.⁴ So, also, in the case of a devise to surviving children and their issue, the distribution will be *per capita*, the children and the issue of deceased children who are living at the period of distribution forming together one class.⁵ And the same rule as to distribution has been held applicable to the

¹ *Almack v. Horn*, 1 Hemm. & M. 630; Co. Lit. 20b.

² *Early v. Benbow*, 2 Coll. 342; *Early v. Middleton*, 14 Beav. 453; affirmed in *Townsend v. Early*, 1 De Gex. Fisher & Jo. 1, 28 Beav. 428.

³ *Paul v. Compton*, 8 Ves. 375. But a provision for the children of A. that he "*now has or may hereafter have*," to be paid to them respectively as each attains majority, includes those who A. has born to him both before and after the death of the testator during his life. *Haggerty v. Hockenberry*, 52 N. J. Eq. 354, 30 Atl. R. 88. Where property was to go to A. for life and then to his children "*born or to be born who should attain*

twenty-one, but if A. should become insolvent then his interest was to cease as if he were dead," it was held that, as the interests in the children were not contingent remainders, but executory devises, they took effect, upon forfeiture by bankruptcy, not only in favor of children who might then be alive, but in favor of all born during his life, though subsequent to the forfeiture. *Blackman v. Fysh* (1892), 3 Ch. 209.

⁴ *Burnet's Ex'r v. Burnet*, 30 N. J. Eq. (1897), 595; *Benedict v. Ball*, 38 N. J. Eq. 48.

⁵ *In re Fox's Will*, 35 Beav. 163, 13 W. R. 1018.

case of a power of appointment among children and the issue of children at the termination of a life estate in the donee.¹ But a remainder after a life estate in A., to her "*children who may be the heirs of her body*" at her death, will be divided *per stirpes* by reason of the force of the word "heirs," referring to children who are alive at the death of the life tenant.²

§ 561. **Direction for an equality of division favors distribution per capita.**—Where the testator devises property to one or more individuals and to the children of another,³ or to the children of A. and B., with an express direction that the division shall be "*in equal shares*," "*equally*," or "*share and share alike*," he will be presumed to have intended that the distribution among all the legatees, both named and as classes, shall be *per capita*.⁴ Thus, where there is a residue directed to be equally divided by A. and B. and the children of C., in equal portions, share and share alike;⁵ a remainder to the testator's three nieces and their children, to be equally divided among them, share and share alike;⁶ or to A., B. and C., equally to be divided, and to the heirs of those who are dead,⁷ the division will be *per capita*.⁸

§ 562. **Whether the distribution amongst the children of several persons shall be per stirpes or per capita.**—Whether, in the case of a devise to the children of two or more persons named, the distribution shall be *per capita* or *per stirpes* among all the children living at the date of distribution, has been a much litigated question, and one upon which the cases are not wholly harmonious. The decision of this question, of course,

¹ In *re White's Trust*, John (Engl.), 656.

² *Houghton v. Kendall*, 7 Allen (Mass.), 78. See *post*, § 623 et seq., as to the mode of distribution among heirs.

³ *Stevenson v. Leslie*, 70 N. Y. 512.

⁴ *Kean v. Roe*, 2 Harring. 103; *West v. Rassman*, 34 N. E. R. 991, 135 Ind. 378; *Bigelow v. Clapp*, 166 Mass. 88, 91; *Farmer v. Kimball*, 46 N. H. 435; *Budd v. Haines*, 29 Am. R. 170, 52 N. J. Eq. 480; *Johnston v. Knight*, 23 S. E. R. 92, 117 N. C. 122; *Hill v. Spruitt*, 4 Ired. Eq. (39 N. C.) 244, 246;

Shinn v. Motley, 3 Jones' Eq. (56 N. C.) 490; *Patterson v. Patterson*, 3 id. 208; *McMaster v. McMaster*, 10 Gratt. (Va.) 275; *Emerson v. Cutler*, 14 Pick. 108; *Perdrian v. Wells*, 5 Rich. (S. C.) Eq. 20; *Barksdale v. Macbeth*, 7 Rich. (S. C.) Eq. 132.

⁵ *Culp v. Lee*, 14 S. E. R. 74, 109 N. C. (1891), 675.

⁶ *Kuhn v. Webster*, 12 Gray (Mass.), 3.

⁷ *Murphy v. Harvey*, 4 Edw. Ch. (N. Y.) 131.

⁸ *Cf. also post*, § 623.

depends upon the intention of the testator. If he intends that *all* the children of the several persons named as parents shall take as constituting *one* class, then the distribution will be *per capita*. If the parents are related to him in the same degree, as where the parents are his sons and daughters, the nature of the presumption which favors an equality of division will tend to establish a division among the children *per capita*. On the other hand, if the devise is to the children of persons bearing different degrees of relationship to him, or to his own children, and also the children of a stranger, it may be presumed that he made this disposition having in mind the law of descent and the rules regulating the distribution of the estates of deceased persons who die intestate. Where the intention of the testator is in doubt upon the question of the mode of division amongst children of persons named, the American cases favor a distribution *per stirpes*, while the English cases favor a distribution *per capita*. If the testator shall provide that the distribution among the children shall be *share and share alike*, or in *equal* shares, or *equally*, etc., his language is conclusive. But, in the absence of such express directions, we must resort to the general rules as deduced from the cases. Where there was a provision of property *for the children of A. and for the children of B.*, it was held that the distribution should be *per capita* amongst all the children.¹

A devise in the following language, "I give my property to be divided *between* the children of A. and B. share and share alike," will generally be construed to require a division *per capita* among all the children of the persons named. The courts will substitute the word "*among*" for "*between*," and the division will not be *between the different stocks* represented by the persons named, but *among the children of all the individuals* named as forming one class.²

¹ Macknet v. Macknet, 24 N. J. Eq. 298; Brown v. Brown, 6 Bush (Ky.), 648, 651; Nichols v. Denny, 37 Miss. 59, 64; Weld v. Bradley, 2 Vt. 705; Lockhart v. Lockhart, 3 Jones' (N. C.) Eq. 205; Roper v. Roper, 5 Jones' (N. C.) Eq. 16, 17; Dugdale v. Dugdale, 11 Beav. 402; Dowding v. Smith, 3 Beav. 541; Pattison v. Pattison, 19

Beav. 638; Amson v. Harris, 19 Beav. 210. The fact that there is a limitation over to the survivor of the children, in the case of a devise to the children of A. and the children of B., is not material in this connection. Hill v. Bowers, 120 Mass. 135.

² Walker v. Moore, 1 Beav. 607; Armitage v. Williams, 27 Beav. 346;

In the case of a devise of real property or a legacy to A. and B. for *their joint lives*, in which case they will take as joint tenants, or in a case where they take as tenants in common, if there is inserted an express direction creating a survivorship, as where there is a remainder over to either of them upon the death of the other, with a provision that, on the death of the survivor of the several life tenants, the remainder shall go to or be distributed among the children of the life tenants, all those children living at the death of the testator, together with those born during the joint life tenancy, with the issue of children deceased, will constitute the class of children who are to take at the death of the survivor, and, being thus a class, the children and issue will take *per capita*.¹ On the other hand, where the gift is to A. and B. equally for *their respective lives*, or as tenants in common, with a remainder to the children of each, though with no express direction in what proportion these children are to take, the children of A. or B. will take *per stirpes* at once on his death, though there is a direction that the property is to be equally divided among the children.² The share of either life tenant on his death will go to all *his* children who may be then living; and, if the remainder was vested, to the issue or heirs of deceased children, irrespective

Lugar v. Harmon, 1 Cox, 250; Weld v. Bradbury, 2 Vernon, 705; Barnes v. Patch, 8 Ves. 604; Lady Lincoln v. Pelham, 10 Ves. 166; Brown v. Brown, 7 Gill (Md., 1848), 347; Webster v. Foster, 7 Met. (48 Mass.) 97; Stokes v. Tilly, 9 N. J. Eq. 130. The case of Alder v. Beale, 11 Gill & J. (Md.) 123, in which the devise was to the children of my sister A. and their heirs, and the children of my sister B. and their heirs; and Mayer v. Hover, 81 Ga. 308, 7 S. E. R. 562, where the devise was to be divided between the children of H. and M. "*share and share alike*," are *contra*; but the latter case was clearly decided erroneously, and in the former the circumstances and language of the will were too special to make it a precedent. A direction to divide the residue *between* the children of

A. and the children of B., neither of whom would have inherited from the testator, requires a distribution *per stirpes*. In re Ihrie's Estate, 29 Atl. R. 750, 162 Pa. St. 369. See also 11 L. R. A. 305.

¹ Smith v. Streatfield, 1 Mer. 358, 361; Stevenson v. Gullan, 18 Beav. 590, 592; Malcolm v. Martin, 3 Bro. C. C. 50, 57; Swabey v. Goldie, L. R. 1 Ch. D. 380, 384; Parker v. Clarke, 6 De Gex, M. & G. 104, 110; Begley v. Cook, 3 Drew. 662, 667; Parfitt v. Hember, L. R. 4 Eq. 443; Taaffe v. Conmee, 10 H. L. Cas. 64; Walters v. Crutcher, 15 B. Mon. (Ky.) 2; Cheeves v. Bell, 1 Jones (N. C.) Eq. 234, 237; Bethea v. Bethea (Ala., 1897), 22 S. R. 561; Rhode Island Hos. Tr. Co. v. Peckham (R. L.), 38 Atl. R. 1001.

² Flinn v. Jenkins, 1 Coll. 365.

of the number of children the other life tenant may have had, or may have living at that date, or may leave him surviving at his subsequent death.¹

§ 563. Where children take by substitution the distribution will be per stirpes.—Where the gift to children is not an original gift, but is substitutional to a class in its character, as it would be in the case of a gift to A. and B., and, in the event of the death of either of them, to their children, the distribution will be *per stirpes*.² That is to say, the fund or property will be divided into shares equal in number to the original legatees named, and the children of any deceased legatee will take their parent's share equally among them.³ And, generally, where there is a gift to individuals, coupled with a direction that, in the case of the death of any one or more of them, the children or issue of the deceased shall take the parent's share, the distribution among the issue or children will be *per stirpes*, according to the amount which the parents would have received if they had survived.⁴

§ 564. Mode of distribution where the devise is to individuals and the children of another.—The rule of distribution in the case of a devise to A. individually, and to the children of B. as a class, differs in England from the rule in America. According to the English cases, where a direction is found in the will that property shall be divided among or between A., an individual, and the children of B. as a class, and nothing

¹ *Willes v. Douglass*, 10 Beav. 47; *Bradshaw v. Melling*, 19 Beav. 417; *Saril v. Saril*, 23 Beav. 87; *Turner v. Whittaker*, 23 Beav. 196; *Archer v. Legg*, 31 Beav. 187; *Pery v. White*, Cowp. 777; *Arrow v. Mellish*, 1 De Gex & Smale, 355; *Coles v. Witt*, 2 Jur. (N. S.) 1226; *In re Laverick's Estate*, 18 Jur. 304; *Wells v. Wells*, L. R. 20 Eq. 342; *Taniere v. Pearkes*, 2 Sim. & St. 383.

² Compare §§ 353, 354.

³ *Crozier v. Cundall* (Ky., 1896), 35 S. W. R. 546; *Hopkins v. Keazer*, 89 Me. 347, 36 Atl. R. 615; *Slingluff v. Jones* (Md., 1898), 39 Atl. R. 872; *Hamilton v. Lewis*, 13 Mo. 184, 188; *Coster v. Butler*, 63 How. Pr. (N. Y., 1881),

311; *In re Seebeck's Estate*, 35 N. E. R. (1893), 429, 140 N. Y. 241; *In re Howard's Estate*, 30 N. Y. S. 684, 81 Hun, 91; *Henderson v. Womack*, 6 Ired. Eq. 437, 441; *Davis v. Bennett*, 31 L. J. Ch. 337, 8 Jur. (N. S.) 269; *Price v. Lockley*, 6 Beav. 180; *Burrell v. Baskerfield*, 11 Beav. 525; *Congreve v. Palmer*, 16 Beav. 435; *Timins v. Stackhouse*, 27 Beav. 434; *Shailer v. Groves*, 6 Hare, 162; *Gowling v. Thompson*, 19 L. T. (N. S.) 242; *Armstrong v. Stockham*, 7 Jur. 230.

⁴ *Ross v. Ross*, 20 Beav. 645; *In re Orton's Trust*, L. R. 3 Eq. 375; *Palmer v. Crutwill*, 8 Jur. (N. S.) 479. Compare *ante*, § 354.

indicates whether the testator intended a division *per stirpes* or *per capita*, the division or distribution shall be *per capita*, and A. will take for his share only as much of the property as one of the children who form the class. Cases of this kind usually occur where the testator has provided for a distribution of his property to his son A. and the children of his son B., without indicating in what proportion the property is to be divided. But it is not confined to such cases, and will include the children of persons who are not related to the testator or to one another in any way.¹ In America the general rule is now quite otherwise. In all cases where there is a devise to one or more individuals, and to the children of other individuals as a class, the distribution will be *per stirpes*, even where there is a direction apparently pointing to an *equality of division*. Thus, where the gift is to A., B. and C. and the *children of D.*, the property will be divided into four equal parts, and D.'s children will take one-fourth equally among or between them; and it is immaterial that the persons A., B., C. and D. are all the children of the testator.²

¹ Dowding v. Smith, 8 Beav. 541; Rickabee v. Garwood, 8 Beav. 579; Butler v. Stratton, 3 Bro. C. C. 367; Paine v. Wagner, 12 Sim. 184; Williams v. Yate, 1 C. P. Coop. 177, 1 Jur. 576; Hyde v. Cullen, 1 Jur. 100; Payne v. Webb, L. R. 19 Eq. 26; Blackler v. Webb, 2 P. W. 383; Linden v. Blackmore, 10 Sim. 626. Early American cases sustaining this rule of a division *per capita* are Benson v. Wright, 4 Md. Ch. 279; Myres v. Myres, 23 How. Pr. (N. Y.) 410, 414; Gilliam v. Underwood, 3 Jones' (48 N. C.) Eq. 100, 101; Dupont v. Hutchinson, 10 Rich. Eq. (S. C.) 1, 3; Conner v. Johnson, 2 Hill, Eq. (S. C., 1837), 43.

² Lyon v. Acker, 33 Conn. 222; Raymond v. Hillhouse, 45 Conn. 467; Haas v. Atkinson, 20 D. C. 537; Fraser v. Dillon, 3 S. E. R. 695, 68 Ga. 474; White v. Holland, 92 Ga. 216, 18 S. E. R. 17; Henry v. Thomas, 20 N. E. R. 519, 118 Ind. 23; Wells v. Hutton, 43 N. W. R. 768, 77 Mich. 129; Clarke v.

Lynch, 46 Barb. (N. Y.) 69; Vincent v. Newhouse, 83 N. Y. 505; Ferrer v. Byne, 18 Hun, 111, 81 N. Y. 281; Fissel's Appeal, 27 Pa. St. 55; Lachland's Heirs v. Downing, 11 B. Mon. 32, 34; Minter's Appeal, 40 Pa. St. 111. In England in every case where property is devised to A. and B. and their children, or to a class of persons, as sisters and brothers and their children, all will take concurrently and the distribution will be *per capita*; parents and children being included as members of the same class. Cunningham v. Murray, 1 De Gex & Smale, 366; Abbay v. Howe, 1 De Gex & S. 470; Northey v. Strange, 1 P. W. 340; Law v. Thorp, 4 Jur. (N. S.) 447, 27 L. J. Ch. 649, and cases cited *ante*, p. 741, note 1. In Pennsylvania this rule was applied to a devise to individuals and their children, where it was evident that the word "children" was a word of purchase and not a word of limitation, and not employed to point out the quality or

§ 565. **Erroneous statement of the number of children.**— If the testator, in providing for the children of another, and even where the gift is to his own children, states the number of children he wishes to benefit, and the number which is thus *stated is less than the actual number of children*, the court has power to correct his mistake. Where the number is *understated*, all the children will take the gift, upon the very reasonable presumption that the understatement was unintentional and inadvertent, and that it did not indicate an intention to discriminate among the children.¹ If this construction and correction are not resorted to and permitted, the provision for children incorrectly enumerated will be void for uncertainty. And the presumption of a mistake is recognized as readily where the gift is to the children of the testator as where it is to the children of another; for, though a man is more likely to know how many children he has than he is to be acquainted with the size of another's family, still he may make a mistake in enumerating them as well in the one case as in the other. Where the testator gave a specific legacy to "each of his four children" where he had five,² to each of the "three children of his sister,"³ to the "two daughters of T. in equal shares, and if *either* should die, then over,"⁴ to each of the daughters of T., and if *both or either should die*, by which language the testator clearly indicated that he believed that T. had only two daughters,⁵ and in each case the person mentioned as the parent had one more child or daughter than was stated in the will, all were permitted to take.⁶

quantity of the estate that the parent is to take. In *re McIntosh's Estate*, 27 Atl. R. 1044, 158 Pa. St. 528; Appeal of McIntosh, 27 Atl. R. 1047, 158 Pa. St. 528; Appeal of Robert G. McIntosh, *id.*; In *re McIntosh's Estate*, 27 Atl. R. 1048, 158 Pa. St. 528; Appeal of John S. McIntosh, *id.* But the general rule under which the distribution is to be *per capita* will not be applied to a devise to A. and the children of B., where the testator expressly provides that, until distribution, the income is to be divided among the children *per stirpes*. *Brett v. Horton*, 4 Beav. 239; *Crone v.*

Odell, 1 Ba. & Be. 449, 3 Dow. 61; *Overton v. Bannister*, 4 Beav. 205.

¹ *Cf. ante*, §§ 475, 476.

² *Procter's Estate*, 2 Pa. Co. Ct. R. 474.

³ *Tomkins v. Tomkins*, 2 Ves. 564; *Garvey v. Hibbert*, 19 Ves. 125; *Perkins v. Fladgate*, 41 L. J. Ch. 681, L. R. 14 Eq. 54, 20 W. R. 589.

⁴ *Stebbing v. Walkey*, 2 Bro. C. C. 85; 1 Cox, Ch. 250; *Spencer v. Ward*, L. R. 9 Eq. 509, 18 W. R. 358, 22 L. T. (N. S.) 702.

⁵ *Scott v. Fenoulhett*, 1 Cox, Ch. 79.

⁶ See also *Mathews v. Foulshaw*, 12 W. R. 1141, where a testator having

Where the testator directs a fund to be divided among several children, the number of whom he incorrectly *overstates*, the incorrect number will be wholly rejected and the fund will be divided among or between the actual number of children.¹ Thus, where a gross sum was given to the five daughters of A., who had only one daughter at the date of the execution of the will and also at the death of the testator, she was permitted to take all, though A. had four sons at both periods.²

The fact that the testator knows the exact number of the children of A. at the date of the will does not seem to be material, or to be sufficient to prevent a division among those who are actually the children, where the numbers disagree. So where the testator bequeaths a legacy to each of the *three* children of A., knowing that A. had *nine* children, it was held that all the children were entitled.³ Whether the testator, knowing that at the date of the will a person has a specified number of children, to which number, described as "*now living*," he gives a fund, will include children born after the date of the will, has been variously determined.⁴ If, however, from the context it can be ascertained *which of the children the testator intended to benefit*, where he has given property to children of persons, *understating their number*, the rule will not be applied. It is only applied where the devise would be void for uncertainty. Accordingly where a testator gave a legacy to the two grandchildren of A., who had three grandchildren, adding that they lived at X., and only *two* of them lived at

ten grandchildren gave property to his *nine* grandchildren.

¹Lawton v. Hunt, 4 Strobb. Eq. (S. C., 1850), 1. The same rule would seem to be applicable where there is pecuniary legacy to each child.

²Lord Selsey v. Lord Lake, 1 Beav. 15. See also Carthew v. Enraght, 20 Week. R. 743; Thompson v. Young, 25 Md. (1866), 450; Shepard v. Wright, 5 Jones' (50 N. C.) Eq. 22. A division of a fund into eight equal shares was made by the testator, who then disposed of them among the children of A. and B. To some he gave two shares, and to others one,

but only disposed of seven shares. The division into eight shares was disregarded, and a division into seven shares decreed. Berkeley v. Pulling, 1 Russ. 496. But an incorrect enumeration of a class will not be rejected unless it appears to be the intention of the testator to benefit the whole class. In re Stephenson (1897), 1 Ch. 75.

³Daniell v. Daniell, 3 De Gex & Sm. 337.

⁴Yeats v. Yeats, 16 Beav. 170; but see *contra*, Smith's Trusts, L. R. 9 Ch. D. 117; Sherer v. Bishop, 4 Bro. C. C. 55.

the place mentioned, his bounty was confined to these two.¹ A similar rule of construction would apply where the provision was for my *four* nephews and niece,²—namely, A., B., C. and D.; or for children of a certain person, *namely*, and then some are specifically named;³ to my nine children who are named,⁴ and the actual number of nieces or children exceeds the number enumerated. In such case only those *actually named will take*, and the number will be rejected as inaccurate and superfluous.

§ 566. **Construction of provision for a devise over in case legatee dies without children.**—A provision that in the case of the “death of A. *childless*,” or “*without children*,” an estate which has been given to him *for life* shall go to B., is extremely ambiguous. A testator *may* mean that, if A. shall *die without children surviving him*, the estate is in that case to go over. Then, assuming that the word “children” was used in its primary meaning, if all the children who have been born to A. are dead at the death of the life tenant, their issue will not answer to the description, and the devise over to B. will go into effect.

On the other hand, if, by the death of A. “*without children*” or “*childless*,” the testator meant A.’s death *without having had a child born to him*, it is not material that A.’s children shall not survive their parent; for, if the remainder is given to his children, it vests on their birth, subject to open and let in after-born children, and the shares of those who die before the death of the life tenant will go to their issue or to their heirs. But a devise over in the event of the death of the primary devise “*childless*” or “*without children*” will presumptively be regarded as meaning without leaving a child surviving him.⁵ In

¹ Wrightson v. Calvert, 1 Jo. & Hem. 250.

² Glanville v. Glanville, 33 Beav. 302.

³ In re Hull’s Estate, 21 Beav. 314.

⁴ Zimmerman v. Briner, 50 Pa. St. 535.

⁵ Mathews v. Hudson, 81 Ga. (1888), 120, 7 S. E. R. 286; Richardson v. Richardson, 80 Me. (1888), 585, 592; Barney v. Arnold, 15 R. I. (1885), 78,

23 Atl. R. 45; McLeod v. Dill, 9 Fla. (1860), 427. A remainder to B., coming after a devise to A., and “if A. should have children, then to her children;” but if she should die “*childless*,” then to B., is a contingent remainder, which is defeated if A. shall die *leaving children her surviving*. Furnish v. Rogers, 39 N. E. R. 989, 154 Ill. 569.

an early case where the devise was to A. and B., and if either of them "*die without children*," then to the survivor, the court so held.¹ Primarily it is clear that the words "leaving children" obviously point to the period of the parent's death.² Thus, a gift to B. on the death of A., "*leaving*" *no child or children her* surviving, is valid where A. had five children who died unmarried and *in her life-time*.³

And this rule of construction is doubtless the correct one where the gift, for example, is to a parent, and if he shall die "*leaving*" issue or children, then to his issue or children; or in the case of an executory devise to such children as "A. may leave." "Leaving" cannot here be construed "having had," and for this reason only, those children who actually survive their parent will constitute the class who are to take, to the exclusion of the issue or the heirs of those who have predeceased him.⁴ Where a devise was to A. for life, and if she *leave children*, then among those children, with a gift over in case any child died under twenty-one, it was held that the heirs of a child who attained twenty-one, but who died in the life-time of the parent, took no share.⁵

Very frequently, however, the words "*without leaving children*" will be construed as co-extensive and synonymous with "*without having had children*." Thus, where the testator has given property to the parent for his life, with a remainder to his children, in such form as to give them a vested interest at their birth, or at the attainment of a particular age, with a limitation over in the case of the parent's death *without leaving children*, "leaving" will be construed "having children" or "having had children;" and the gift to the children becomes absolutely vested in them as soon as they are born, and in con-

¹ Hughes v. Loyer, 1 P. W. (1718), 534; Thickness v. Liege, 3 B. P. C. Toml. 365.

² 2 Jarman on Wills, p. 200.

³ In re Hamlett, L. R. 38 Ch. D. 183, 58 L. T. (N. S.) 614, 36 W. R. 569.

⁴ Wingrave v. Palgrave, 1 P. W. 401, 402; Kimberley v. Tew, 4 Drewry & War. 139, 150; In re Watson's Trusts, L. R. 10 Eq. 36; Sheffield v. Kennett, 4 De Gex & Jo. 593, 594; Bythessea v. Bythessea, 23 L. J. Ch. 1004; Jeyes

v. Savage, L. R. 10 Ch. App. 555, 562, 564; Young v. Turner, 1 Best & Smith, 550. A remainder over in the case of the death of the life tenant, "*leaving no heirs of the body*," relates, of course, to him leaving no heirs of that character at the date of his death. Read v. Snell, 2 Atk. 642, 647; *post*, § 844 et seq.

⁵ Sheffield v. Kennett, 4 De Gex & Jo. 593, 594; Williams v. Haythorne, L. R. 6 Ch. App. 782.

sequence, if any die leaving children, the grandchildren will take.¹

§ 567. *Children en ventre sa mere*.—In the case of a general devise to children, and perhaps also in case of gifts to relations, next of kin, etc.,² it is a rule that a child *en ventre sa mere* will, by a fiction of the law, be recognized as *in esse*, at least where his being *in esse* is for the benefit of the unborn child.³ A distinction was made by some of the early English cases, in the application of this rule, between a devise to *children generally* and a devise to children “who may be *living*” at a particular date.⁴ Subsequently, however, this distinction

¹ *Ex parte Hooper*, 1 Drew. 264, 268; *In re Thompson's Trusts*, 5 De Gex & Sm. 667, 671; *Kennedy v. Sedgwick*, 3 Kay & J. 540; *Maitland v. Challie*, 6 Madd. 243; *Marshall v. Hill*, 2 Maule & Sel. 608; *White v. Hight*, L. R. 12 Ch. D. 751; *White v. Hill*, L. R. 4 Eq. 265, 269, 272; *Bryden v. Willett*, L. R. 7 Eq. 472, 476; *Treharne v. Layton*, L. R. 10 Q. B. 459, 464 (1875); *Weakley d. Knight v. Rugg*, 7 T. R. 322; *Jamison v. McWharter*, 7 Houst. (Del., 1885), 242, 253, 31 Atl. R. 517; *Schaefer v. Schaefer*, 141 Ill. 337, 344, 31 N. E. R. 136. Where the testator bequeathed a legacy to A., but over to B. in case A. “should die leaving no child or children,” and A. married and had six children, it was held that the word “leaving” was to be taken as equivalent in meaning with the words “having had,” and that at its birth each child took an interest, which, at its death before payment, passed to its personal representative. *Male v. Williams*, 48 N. J. Eq. 33, 21 Atl. R. 854. Construing a legacy to A. in case she should have legitimate children, and on failure of such, then over, and she had one child, who died before her, it was held she took absolutely on the birth of the one child. *Wall v. Tomlinson*, 16 Ves. 413, 416. Where a devise is to “A. and his bodily heirs, and if he die *childless*, then over,” it is clear that the plain

intent of the testator to confer an estate on A. and his posterity would be defeated if the devise over is to go into effect when A. shall die leaving no child or children surviving, but only *grandchildren*, the issue of deceased children. *Barney v. Arnold*, 15 R. I. 78, 23 Atl. R. 45; *McLeod v. Dill*, 9 Fla. 427.

² *Gardner's Estate*, L. R. 20 Eq. 647.

³ *Petway v. Powell*, 2 Dev. & Bat. (N. C., 1837), Law, 308, 312; *Groce v. Rittenberry*, 14 Ga. (1853), 234; *Riggs v. McCarty*, 86 Ind. 352, 367; *Hall v. Hancock*, 15 Pick. (32 Mass.) 255, 258; *Harper v. Archer*, 4 Smedes & M. (12 Miss., 1845), 99, 108; *Marsellis v. Thalhimer*, 2 Paige Ch. (N. Y.) 35, 39; *Jenkins v. Fryer*, 4 Paige Ch. 47, 53; *Shinn v. Motley*, 3 Jones' Eq. (N. C.) 490, 493; *Swift v. Duffield*, 5 S. & R. (Pa.) 38, 40; *McKnight v. Read*, 1 Whart. (Pa., 1835), 220; *Gross' Estate*, 10 Pa. St. 361; 1 Black. Com., p. 130. “It is the general rule that a child *en ventre sa mere* comes within the expression ‘child or children,’ and is included in a trust in favor of children, whether described as children *in esse*, living at the death, begotten and to be begotten, begotten and born, or in any other similar way.” Remarks of Hall, V. C., in *Crook v. Hill*, L. R. 3 Ch. D. 773.

⁴ *Northey v. Strange*, 1 P. W. 341.

was repudiated in chancery, and the principle laid down, which has ever since been strictly adhered to both in England and in the United States, that the same rule shall apply to a gift to children of A. living at his death or at any other date.¹

Thus, a child who, at the death of A., his father, is still *en ventre sa mere*, will be included under a gift to the children of A. "*born in his life-time.*"² And in a recent case the English courts have decided that a child *en ventre sa mere* will take under a devise to "issue living at the death," upon the argument that the word "*issue*," to the same extent as the word "child," does *not* of necessity imply a birth.³

The rule as to the capacity of children *en ventre sa mere* to take is recognized where a power to appoint among children has been created,⁴ and, of course, where the testator gives property to the children of another as well as to his own children;⁵ and in the case of a gift of a remainder, vested or contingent, or of an executory devise, to children.⁶

So also the existence of a *child en ventre sa mere* at the ter-

¹ Clarke v. Blake, 2 Bro. C. C. 321, 2 Ves. 673, in which Peirson v. Garnett, 2 Bro. C. C. 47, and Freemantle v. Freemantle, 1 Cox Ch. C. 248, are overruled. See also note —, *supra*. A devise to grandchildren as a class, "to be divided *equally as they attain twenty-five years of age*," includes a grandchild *en ventre sa mere* at the death of the testator, though one of the grandchildren was twenty-five years old at that time. Cowles v. Cowles (Conn.), 13 Atl. R. 414. See also Pearce v. Carrington, L. R. 8 Ch. App. 969; Townsend v. Early, 3 De Gex, F. & J. 1; Miller v. Turner, 1 Ves. 85; Davidson v. Dallas, 14 Ves. 576; Scott v. Howard, 5 Mad. 832; Heath v. Heath, 2 Atk. 121; 1 Freeman, 244, 293.

² Trower v. Butts, 1 Sim. & Stu. 181. "I have no doubt on any view of this case. It is plain from the words of the will that the testator meant all the children that his brother should leave behind him should be benefited; but, independ-

ent of that intention, I hold that an infant *en ventre sa mere*, who by the order and course of nature is living, comes clearly within the description of children living at the time of his decease." By Eyre, J., in Doe v. Clark, 2 H. Bl. 399.

³ In re Burrows, 13 Rep. 689, 691, 65 L. J. Ch. 52 (1895), 2 Ch. 497, 78 L. T. 148, 43 W. R. 683; Thelluson v. Woodford, 1 Wils. 105. See also Culp v. Lee, 109 N. C. 675, 14 S. E. R. 74; Rawlins v. Rawlins, 2 Cox, 425.

⁴ In re Farncombe's Trusts, L. R. 9 Ch. D. 652; Beale v. Beale, 1 P. W. (1713), 244.

⁵ Swift v. Duffield, 5 Serg. & R. (Pa., 1819), 38, 40.

⁶ Barker v. Pearce, 30 Pa. St. (1858), 173, 175; Picot v. Armistead, 2 Ired. Eq. (37 N. C., 1842), 226, 231; Stedfast v. Nicoll, 3 Johns. Cas. (N. Y., 1817), 18; Swift v. Duffield, *supra*. By Stat. 12 Car. II, c. 24, an infant *en ventre sa mere* may have a guardian appointed for him. 1 Black. Com., p. 129.

mination of a prior estate may be sufficient to defeat a devise over. Thus, where the testator gives property to A. for life, remainder to his children, and on failure of issue then over, if the life tenant shall die leaving a posthumous child the gift over will be defeated.¹

A child *en ventre sa mere* will not be regarded as a child born, unless he is in fact born alive. He will be *prima facie* presumed, from the ordinary course of nature, to have been conceived nine months before his birth. The courts will take judicial notice of the physiological *data* attending the conception and the birth of a child, though they have the right to confirm and refresh their knowledge in doubtful cases by the evidence of physicians and other experts.² The presumption that a child is conceived nine months before its birth is not conclusive. So also if the child is born dead, or in such an early stage of pregnancy as to be incapable of living, he will be regarded as though he were never born at all, and the estate will not vest in him.³

The fiction of law which treats a child *en ventre sa mere* as actually born is usually said to be indulged in only for the purpose of enabling the child to take a benefit himself, and in any other case the word "born" or "living" will have its natural signification;⁴ for the presumption of the birth of the unborn infant is a fiction to protect his rights in the hope and expectation that he will be born alive and capable of enjoying them. They are thus preserved for him and not for others in anticipation.⁵ Thus, a child *en ventre sa mere* will not take under a

¹ *Pearce v. Carrington*, L. R. 8 Ch. 969; *Laird's Appeal*, 85 Pa. St. 339.

² *Hall v. Hancock*, 15 Pick. (Mass.) 255, 257.

³ *Marsellis v. Thalhimer*, 2 Paige Ch. (N. Y., 1830), 35, 39. In the civil law a child born within six months of conception was conclusively regarded as though not born. 2 Inst. 483. But, at the present day, in view of the methods by which the life of a prematurely-born child may be preserved by the employment of incubators, the presumption would be one of fact to be determined upon the

circumstances of the case. The child *en ventre sa mere* is by the fiction of law presumed to be born *at the date of vesting*. If his mother is *then* unmarried he is illegitimate, though she afterwards marries before his actual birth, so that when he comes into the world he is legitimate. In *re Corlass*, L. R. 1 Ch. Div. 460.

⁴ *Blasson v. Blasson*, 10 Jur. (N. S.) 113, 34 L. J. Ch. 18, 11 L. T. (N. S.) 353, 13 W. R. 112, 2 D. J. & S. 665.

⁵ *Marsellis v. Thalhimer*, 2 Paige (N. Y.), 35, 39.

devise to the children of the testator, where the statute provides that a child born subsequent to the execution of the will, and for whom no provision is made in the will, shall take the share a child would have taken in case the father had died intestate. The courts have held that a provision for "children" will not take the case of a posthumous child out of the statute.¹

§ 568. **Presumption of legitimacy — Character of proof of illegitimacy of legatee.**— In the absence of all proof, a person claiming under a will as the child of the testator will, upon his showing that he was born of a woman whom the testator called his wife, be *prima facie* presumed to be a legitimate child.² The same presumption of legitimacy is of course recognized in the case of one who claims a gift "to the child of A." In consequence of the existence of this presumption of legitimacy, the party who denies that the claimant is a legitimate child will have the burden upon him of proving illegitimacy. This he must do by very strong, cogent and convincing evidence. It was the rule at the early common law that a child born during coverture was conclusively presumed to be legitimate, if at that time the husband was within the four seas, *i. e.*, if he were either in Great Britain or Ireland. An exception to this rule was made only where the husband was shown to be actually

A devise in general terms to the children of the testator will not include a posthumous child to prevent him from claiming under a statute, as a child omitted from the will, the share of the father's property he would have taken if the parent had died intestate. *Armistead v. Dangerfield*, 3 Munf. (Va., 1811), 20, 27; *McKnight v. Read*, 1 Whart. (Pa., 1835), 213, 221. See *ante*, §§ 240-242. In *White v. Barber*, 5 Burr. 2703, 2709, where the testator, providing that in case his wife should at his death be *enceinte*, devised property to such child or children, a child born *after* the execution of the will, but during the life of the testator, was permitted to take, upon the grounds that this child would otherwise be unprovided for. Later in *Doe d. Blak-*

iston v. Haslewood, 10 C. B. 544, 15 Jur. 272, 20 L. J. C. P. 89, a contrary decision was reached and the former case expressly overruled. In the United States no case exactly in point can be founded, though under the statutes a gift to a child of which the wife of testator may be *enceinte*, would not prevent children born during his life from taking a share of his estate if they are omitted from the will. See *Burke v. Wilder*, 1 McCord, Eq. (S. C.) 551; *Goodfellow v. Goodfellow*, 18 Beav. 356, 363; *Alleyne v. Alleyne*, 2 Jo. & Lat. 558.

²*Caujolle v. Ferriè*, 23 N. Y. 105, 107, 26 Barb. 177; *Van Aernam v. Van Aernam*, 1 Barb. Ch. (N. Y., 1846), 375; *Cross v. Cross*, 3 Paige Ch. (N. Y., 1832), 139.

impotent.¹ The rule now is that the presumption of the legitimacy of a child born during coverture may be rebutted, though the husband is not shown to be out of England.² If access be shown, meaning thereby an opportunity, however short, for sexual intercourse, the presumption of the legitimacy of a child born during coverture is very strong.³ On the other hand, if non-access existing at the date of conception be shown to the satisfaction of the court, the presumption of legitimacy is readily rebuttable, even though the parties to the marriage have cohabited thereafter.⁴ And generally proof of the absence of the husband from the country, if prolonged, may, by showing the absolute impossibility of access, raise an irresistible presumption that a child born to a wife during coverture is illegitimate.

§ 569. Competency of a husband or wife to prove legitimacy.—Neither husband nor wife can testify directly or indirectly to any fact tending to prove non-access during coverture,⁵ even where the woman was pregnant before her marriage.⁶ The rule of exclusion is very stringent and excludes *all* evidence, direct or collateral, from which the fact of non-access may be inferred.⁷ The fact of non-access must be established

¹ 1 Black. Com. 457; Coke Lit. 244. But in the early days of the present century, the rule establishing this presumption was substantially modified. Foxcroft's Case, 1 Rolle Abr. 359.

² Pendrell v. Pendrell, 2 Stra. 925; Wright v. Hicks, 12 Ga. (1853), 155; Morris v. Davies, 5 CL & Fin. 163; Reg. v. Murrey, 1 Salk. 122.

³ Plowes v. Bossey, 31 N. J. Ch. 681; Vernon v. Vernon, 6 La. Ann. 242; Woodward v. Blue, 107 N. C. 407. In the Banbury Peerage Case, 1 Sim. & Stu. 153, the court held that children who were conceived during coverture, and while the parties to the marriage cohabited, would be conclusively presumed to be legitimate, though it was proved that the wife had been guilty of adultery.

⁴ Bullock v. Knox, 96 Ala. 195, 11 S. R. 839; State v. Worthingham, 23

Minn. 528, 534; Wright v. Hicks, 12 Ga. 155; Herring v. Goodson, 43 Miss. 392, 396; Cross v. Cross, 3 Paige Ch. 139; Vetten v. Wallace, 39 Ill. App. 390, 397; Dean v. State, 29 Ind. 483, 485; Pittsford v. Chittenden, 58 Vt. 51.

⁵ Cope v. Cope, 1 M. & R. 269; Com. v. Shepherd, 6 Binney (Pa., 1814), 283, 285; Mink v. State, 60 Wis. 583, 585, 19 N. W. R. 445. The fact that either party to the marriage is dead does not alter this rule. The modern statutes removing common-law disqualifications upon witnesses do not remove this one. Tioga County v. South Creek Township, 75 Pa. St. 433.

⁶ Page v. Dennison, 1 Grant Cas. (Pa., 1854), 377.

⁷ "Testimony of the wife even tending to show such fact or of any fact from which such non-access could be inferred, or of any collateral fact con-

by other evidence. It may be proved that the husband was absent from his home at the date on which the child was conceived. When it is proved that husband and wife did not live together at the date of conception, and could not have had sexual intercourse at that date, the presumption of legitimacy is overcome. And if it be proved that the husband has been absent from the country for a period which is longer than the period of gestation, as where the parties had separated years before and had since resided in cities widely separated, the facts of non-access and of illegitimacy may be regarded as conclusively established.¹ The declarations of either a husband or wife are admissible after his or her death to prove legitimacy, or the contrary, by any evidence not tending to show access or non-access, such as the fact or date of birth,² or on the question of marriage.³ If the fact of non-access has been satisfactorily proved by the evidence of other witnesses, the wife's confession of adultery may properly be received in corroboration.⁴ So if there is some evidence of non-access or the reverse, the treatment of a child by its parents, its recognition or non-recognition by them and by other members of the family, the fact that the father provided for its support and education as a member of his family, are all relevant.

nected with the main fact, is to be scrupulously kept out of the case; and such non-access and illegitimacy must clearly be proved by other testimony." Questions such as "Who was with you on a certain date?" or "Where was your husband on that date?" are particularly objectionable.

¹ *Rex v. Luffe*, 8 East, 193; *Haworth v. Gill*, 30 Ohio St. (1876), 627, 628; *Watts v. Owen*, 62 Wis. 512; *Herring v. Goodson*, 43 Miss. (1870), 392, 396;

Boykin v. Boykin, 70 N. C. 262, 264; *Pittsford v. Chittendon*, 58 Vt. 49; *Cross v. Cross*, 3 Paige (N. Y.), 139; *Dennison v. Page*, 29 Pa. St. 420; *Egbert v. Greenwalt*, 44 Mich. 245; *Corson v. Corson*, 44 N. H. 587.

² *Blackburn v. Crawfords*, 3 Wall. (U. S.) 194; *Caujolle v. Ferriè*, 23 N. Y. 104, 105, 107 et seq.

³ *Caujolle v. Ferriè*, *supra*.

⁴ *Cross v. Cross*, 3 Paige, 141.

CHAPTER XXVI.

GIFTS TO ILLEGITIMATE CHILDREN.

§ 570. By a devise to "children," legitimate children only are meant.

571. When a gift to "children" generally will include illegitimate children where there are no others.

572. Parol evidence to show that the testator meant illegitimate children.

573. The identification of the children by name.

§ 574. The recognition of illegitimate children by the testator.

575. When illegitimate children may take with legitimate children as a class.

576. Testamentary provisions for unborn illegitimate children.

577. Provisions for illegitimate children *en ventre sa mere*.

578. The effect of judicial decree legitimatizing illegitimate children.

§ 570. By a devise to "children," legitimate children only are meant.— In the absence of evidence of a contrary intention it is conclusively settled that only legitimate children are entitled to take under a provision giving property to children *simpliciter*. Whatever the word may be indicating kindred, whether children, issue,¹ descendants, sons, or daughters,² it will be generally taken to include only those persons who are legitimate children, issue, etc. It is as though the word "legitimate" were written in the will before the word "children," "sons," "issue," etc. This rule of construction is based upon the maxim of the civil law, "*Qui ex damnato coitu nascuntur, inter liberos non computentur*;" and although natural children who have acquired the reputation of being the children of the testator, or of the person mentioned in the will, prior to the date of its execution, may, under some circumstances, be capable of taking under the description of children, yet they are not permitted to take upon mere conjecture of intention. There must be either an *express designation of children as illegitimate children*, or there must be such necessary implication of an intention that they

¹ Miller's Appeal, 52 Pa. St. 113;
Flora v. Anderson, 67 Fed. R. 182.

² Worts v. Cubitt, 19 Beav. 421.

shall take that no doubt shall remain that the testator intended them to take as children.¹

§ 571. When a gift to "children" generally will include illegitimate children where there are no others.—The circumstances that *no legitimate children are in esse* at the date of

¹Shearman v. Angel, 1 Bailey Eq. 351, 356; In re Haseldine, Grange v. Sturdy, 54 L. T. (N. S.) 322; L. R. 31 Ch. D. 511, 517; In re Harrison (1894), L. R. 1 Ch. 561, 63 L. J. Ch. 385, 70 L. J. 868, 869; Wilkinson v. Adam, 1 Ves. & B. 422, 462; Smith v. Jobson, 59 L. T. 397, 399. "I reject the notion of there being a rule, that illegitimate children cannot, under any circumstances, participate with legitimate children in the benefit of a gift or bequest to children generally. I agree that there is no invariable rule of that sort, but that in each case the question is one which depends upon the language of the will; and that if, from the whole context of the will, it appears that illegitimate children are to be included with legitimate children in the benefit intended, illegitimate children may take. Still, *prima facie*, the word "children" means legitimate children, and is to be read as though 'legitimate' were annexed to it." Lord Cransworth in Owen v. Bryant, 2 De Gex, M. & G. 697, on page 701. As to the presumption that legitimate children only are included under the word "children" when it is used in a will, see Hicks v. Smith, 94 Ga. 809; Kent v. Barker, 2 Gray (Mass.), 535, 536; Adams v. Adams, 154 Mass. 290, 292; Gardner v. Heyer, 2 Paige (N. Y.), 11; Collins v. Hoxie (1829), 9 Paige (N. Y.), 80, 88; Cromer v. Pinckney, 3 Barb. Ch. (N. Y.) 466; Heater v. Vanauken, 14 N. J. Eq. 159, 167; Kirkpatrick v. Rogers, 6 Ired. (N. C.) Eq. 180, 136; Gibson v. Moulton, 2 Disney (Ohio), 158; Bennett v. Cane, 18 La. Ann. 590; Thompson v. McDonald, 2 Dev. Bat. Eq. (N. C.) 463,

479; Shearman v. Angel, 1 Bailey, Eq. 351, 357; Miller's Appeal, 52 Pa. St. 113; Ferguson v. Mason, 2 Sneed (Tenn.), 618, 627; Flora v. Anderson, 67 Fed. R. 182; Hart v. Durand, 8 Anst. 684; Kelly v. Hammond, 26 Beav. 36; Mortimore v. West, 3 Eng. Con. Ch. 442; Dorin v. Dorin, L. R. 7 H. L. 568, 575; Dilley v. Mathey, 11 Jur. (N. S.) 425; Warner v. Warner, 15 Jur. (N. S.) 141; In re Ayles' Trusts, L. R. 1 Ch. D. 282; Ellis v. Houston, L. R. 10 Ch. D. 236; Holt v. Sindrey, L. R. 7 Eq. 170, 173; Paul v. Children, L. R. 12 Eq. 16; In re Lowe, 61 L. J. Ch. 415, 416; In re Overhill's Trust, 1 Sm. & G. 362; Cartwright v. Vawdry, 5 Ves. 580; Harris v. Stewart, 1 Ves. & B. 434; In re Harrison, Harrison v. Higson (1894), 1 Ch. 561; 63 L. J. Ch. 385, 70 L. T. 868; Penrose v. Manning, 63 L. T. 159; Standen v. Standen (1795), 2 Ves. Jr. 589, 594; Raggett v. Browne, 61 L. T. 463, 465; Paul v. Children, L. R. 12 Eq. 16, 17. The presumption that the word "children" does *not* include illegitimate children does not apply to a gift over in case of the death of the children without issue. So held in a case where the testator gave property to an illegitimate daughter by name, and provided for a gift over if any of "his children" die without issue. The property of the daughter, on her death without issue, went over. Smith v. Jobson, 59 L. T. 397, 399. "Issue," in a limitation over on a definite failure of issue, means *legitimate issue*, and if illegitimate children only are left, the gift over, on a failure of issue, is operative. Gibson v. Moulton, 2 Disney (Ohio), 158; Thompson v. McDonald, 2 Dev. & B. Eq. (N. C.)

the execution of the will or at the death of the testator, or at any other period, and even the utter impossibility that there shall ever be any legitimate children because of the death of the parent, do not alone let in those who are illegitimate to take as children. Hence, in some cases where such a combination of facts existed, the gift to children has failed because of the non-existence of any persons to whom the word "children" would apply.

The law requires that the intention to benefit illegitimate children shall be *unmistakably manifested*, but does not lay down any particular form of language by which it *must* be manifested. In England, in a case where there was a provision for the "*eldest child*, male or female, of W.," who had no legitimate children at the date of the will, which fact was known to the testator, but who had several illegitimate children then and also at the time of distribution, the court held, relying largely upon the particular words "*eldest child*," that the eldest of the illegitimate children was not entitled.¹ And the principle of this decision has been repeatedly affirmed in subsequent English cases where there were no legitimate children.² Thus, in a case decided by Sir John Bruce, V. C., where the testator made a provision in trust for the maintenance of his son and for the maintenance of "his (the son's) wife," and the education of "*his children*," and at his "*wife's death*" the principal to be equally divided among *the children of the son then living*, and it appeared that the son was not married to the woman with whom he lived and by whom he had four illegitimate children, they were not permitted to take, in spite of the fact that it was proved that these illegitimate children had been called and treated by the testator as his own grandchildren.³

But it should be noted that these cases are *not* illustrations of the rule that illegitimate children are not capable of taking,

463, 479. An illegitimate child of A. will not be permitted to take a share given to "the lawful issue of" A., upon A.'s death, though the testator knew A. had an illegitimate child, and though the statute provides that an illegitimate child whose parents intermarry shall have all the rights of legitimate offspring. U. S. Trust Co.

v. Maxwell, 57 N. Y. S. 53, 26 Misc. R. 276.

¹ Godfrey v. Davis, 6 Ves. 48.

² Doggett v. Moseby, 7 Jones' L. (N. C.) 587; Kenebel v. Scrafton, 2 East, 530; Harris v. Lloyd, T. & R. 810.

³ Warner v. Warner, 15 Jur. (N. S.) 141.

for they were all decided, not under the general rule, but upon the ground that, in each particular case, the testator had not expressed himself in a sufficiently clear manner to show that he intended the illegitimate children to take. For if, from the will itself, it is not clearly apparent to the court that he intends illegitimate children to take, *it is immaterial that when he makes his will he knows of their existence*, and that he also knows *that there are then no legitimate children*. Later English cases have departed from this strict rule where there are only illegitimate children, and particularly where the parent is deceased. Where the testator devises property to the children of A., describing them as the children of the late A., or A., the parent, is named by the testator *as deceased*, and A. died leaving no legitimate, but one or more illegitimate children, of all of which the testator has knowledge, a very strong presumption must arise in favor of the illegitimate children from these facts, as it was an impossibility at the date of the will that there should be any legitimate children born to A. subsequently, which the testator knew. It may then be assumed that the testator intended the illegitimate children then living, whether his own or of some other person, to take under a general bequest to children.¹

§ 572. Parol evidence to show that the testator meant illegitimate children.—The intention on the part of the testator to include illegitimate children under the term “chil-

¹ *Gardner v. Heyer*, 2 Paige (N. Y.), 11; *Ferguson v. Mason*, 2 Sneed (Tenn.), 618, 627; *Woodhouselee v. Dalrymple*, 2 Mer. 419; *Leigh v. Byron*, 29 Beav. 233; *Lepine v. Bean*, L. R. 10 Eq. 160, 162; *Beachcroft v. Beachcroft*, 1 Mad. 430; *Overhill's Trusts*, 1 Sm. & Gif. 362, 367. But it must always be proved that the testator knew that the person spoken of as the parent was deceased at the date of the will; for such knowledge, unless it appears on the face of the will, is not to be presumed. In *re Herbert's Trusts*, 1 Jo. & Hem. 121. The daughter of the testator was, with *his* knowledge, living with a man whom she afterwards married. She had a son by him who was living

at the date of the will, of whose existence the testator knew. She was then sixty-seven years of age, her lawful husband dead, and she had no legitimate children. *Held*, that this son would take by virtue of a devise to “all children of my said daughter, whether by her *present putative husband* or by any person she may marry.” In *re Brown*, 61 L. T. 239, 242. In *Dorin v. Dorin*, L. R. 7 H. L. Cases, 568, 573, where a man having two illegitimate and no legitimate children married the mother of the former, and made a will devising property to *his children*, the devise failed where he, at his death, had no legitimate children.

dren" must appear from the will itself. The presumption is that he uses the word "child," "son," "issue," etc., in the ordinary sense, to mean a legitimate child, or son, or legitimate issue. The question to what extent extrinsic evidence may be received to show that illegitimate children were intended to be included is involved in controversy. It is however settled that the declarations of the testator, no matter when made, to the effect that he intended a certain illegitimate child to take as a legitimate child, are never relevant.

But parol evidence of the circumstances of the testator's family, where *his* illegitimate children claim, or of the circumstances of the family of the person described in the will as the parent, is admissible.¹ Thus, it may be proved by parol that the person who is mentioned as the parent had never been married, and that he or she had illegitimate children, and that they were living at the date of the execution of the will.² And it may also be shown by parol evidence that certain illegitimate children had, at or before the date of the will, acquired the reputation of being the children of the testator, or of the person whose name is mentioned in the will as the parent.³ Parol evidence is always received to show whether the testator knew of the existence of illegitimate children, and whether he knew the fact that the father of persons claiming as children was dead.⁴ Such knowledge will not usually be presumed to exist in the absence of all proof of its existence.⁵

¹ *Beachcroft v. Beachcroft*, 1 Mad. 480, 487; *Crone v. Odell*, 1 Ba. & Be. 481; *Goodinge v. Goodinge*, 1 Ves. 231.

² *Gardner v. Heyer*, 2 Paige (N. Y.), 11; *Laker v. Hordern*, L. R. 1 Ch. D. 644, 34 L. T. (N. S.) 88.

³ *Heater v. Van Auken*, 14 N. J. Eq. 159, 167; *Collins v. Hoxie*, 9 Paige Ch. 80, 88; *Gardner v. Heyer*, 2 Paige Ch. 11; *Cromer v. Pinckney*, 8 Barb. Ch. (N. Y.) 466; *Powers v. McEachern*, 7 S. C. 290; *Shearman v. Angel*, 1 Bailey Eq. 851, 852; *Ferguson v. Mason*, 2 Sneed (Tenn.), 618, 628; *Hill v. Crook*, 6 H. L. Cas. 265, 7 Moak, Eng. R. 1; *Lord Woodhouselee v. Dalrymple*, 2 Mer. 419, 428; *Swaine v. Kennerly*, 1 V. & B. 469, 470; *Wilkinson v. Adam*, 1 Ves. & B. 422, 462;

Cartwright v. Vawdry, 5 Ves. 530. The presumption is that a person claiming as a child is a legitimate child, and the burden of proving that he is *not* is upon the party asserting his illegitimacy. *Metheny v. Bohn*, 160 Ill. 263, 43 N. E. R. 380; *In re Mathews*, 37 N. Y. 308, 1 App. Div. 231. The declarations of the parents of the person alleged to have been illegitimate, where the parents are dead, are admissible to show the invalidity of the marriage, where the illegitimacy of the child is in issue. *Shorten v. Rudd*, 42 Pac. R. 337, 56 Kan. 43.

⁴ *Herbert's Trusts*, 29 L. J. Ch. 870, 871.

⁵ Mr. Williams, in his work on Ex-

§ 573. **The identification of the children by name.**— If an illegitimate child is properly identified by name or other circumstances appearing in the will, no objection can be raised to his taking the bequest as an individual. Accordingly, where the testator has devised property to one or more of his illegitimate children by name, as “to my son John” and “my daughter Mary,” they would not only take the particular bequest, but the will shows the intention of the testator that they shall also take, under the term “children,” a share of the residue.¹ Accordingly, where the testator first includes illegitimate children by name among his children, and then in the will gives property to his “said children,” the illegitimate children will be entitled to take as of the class by the effect of the word “said.”²

Where the testator, enumerating his nine children, three of them sons and six daughters, mentioning them as the children of his “present wife,” and reciting that he had provided for his four married children, made a provision for his two unmarried daughters *by name*, with a remainder to all of “*his said children by his said present wife*” living at his decease, the court, relying upon the implication created by the word “*said*,”

ecutors, page 1184, thus summarizes the English rules of law on this subject: “Natural children, having acquired the reputation of being the children of a particular person prior to the making of the will, are capable of taking under the description of ‘children.’ And they may take in classes of children ‘legitimate or illegitimate.’ But the will must show the testator’s intention to include them under this description, either by express designation or by necessary implication. For otherwise the term ‘child,’ ‘son,’ or ‘issue’ must be understood to mean *legitimate* child, son or issue. No extrinsic evidence can be received except to prove the fact of illegitimate children having at the date of the will acquired the reputation of being the children of the testator or the person named in the will, and that the testator knew that fact and the state

of the family. Again, it is a rule (though not an invariable one) that wherever the general description of children in a will will include legitimate children, it cannot be extended to illegitimate children. In other words, the rule of law is that, where there are legitimate children to answer the description of children, legitimate children only will take.”

¹Smith v. Jobson, 59 L. T. 397, 399; Cartwright v. Vawdry, 5 Ves. 530, 534; Raggett v. Browne, 61 L. T. 463, 465; In re Brown, 62 L. T. 899; River’s Case, 1 Atk. 410.

²Evans v. Davies, 7 Hare, 498; Hartley v. Tribber, 16 Beav. 510. So an illegitimate daughter was admitted to the benefit of a provision “for *all my daughters*,” coming after a devise “to *my natural* daughter A. and to my *other daughters*.” Worts v. Cubitt, 19 Beav. 421.

and the enumeration and mention of the children, permitted the illegitimate children of the testator by his then wife to take under the devise to his said children.¹ A gift to four children of A. by an enumeration of names, being preceded by the word "namely," is a valid gift to individuals, not to a class, and all those named may take, though three out of the four are the illegitimate children of A.²

It has also been held that the circumstance that the testator gives a legacy to *some* of his illegitimate sons *by name* may raise a presumption that he does *not* intend that other illegitimate children of his *not named* shall take under a gift to his children generally.³ And an express exception by name of one illegitimate child of A. from the benefit of a provision for A.'s children as a class creates no presumption whatever that the testator intended, by this exception, to include another illegitimate child who is not mentioned.⁴ Upon the question of the construction of a devise to *children of the late A.*, who is dead at the date of the will, having left *all illegitimate children*, or some legitimate and some illegitimate, the English cases are not harmonious. In a case⁵ where the bequest was to the "sons and daughters of the late J. B.," who had only one legitimate child (a daughter);⁶ and where the gift was to the child or children of the testator's *late son*, who had one legitimate and several illegitimate children, the court excluded *all* the illegitimate children and permitted the one legitimate child to take all.⁷ But these early cases have been repudiated and overruled by subsequent English decisions, the effect of which has been to permit illegitimate children to take, as members of the class, where the devise was to the children of a person who is described by the testator as deceased at the date of the will.⁸

¹ Owen v. Bryant, 2 De Gex, M. & G. 697, 701, 704, 21 L. J. Ch. 860.

² Meredith v. Farr, 2 Y. & C. C. C. 525; Raggett v. Browne, 61 L. T. 463, 465; Gardner v. Heyer, 2 Paige (N. Y.), 11. This case also holds that the naming of some illegitimate children as beneficiaries in one portion of the will is not a sufficient indication of an intention to have them take as members of a class which is com-

posed of the children of the same person.

³ Kelly v. Hammond, 26 Beav. 36.

⁴ In re Wells, L. R. 6 Eq. 599, 601.

⁵ Hart v. Durand, 8 Anst. 684.

⁶ Swaine v. Kennerley, 1 Ves. & B. 469.

⁷ Ante, § 572.

⁸ Gill v. Shelley, Wigram on Wills, pl. 55; Leigh v. Byron, 1 Sm. & Gif. 486, 17 Jur. 822; Edmunds v. Fessey,

§ 574. **The recognition of illegitimate children by the testator.**—The fact that the testator in his life recognizes and treats his own illegitimate children *as legitimate children*; or that, in his will, he describes them by terms *implying their legitimacy*, is not conclusive evidence of an intention on his part that they shall take under a bequest to his children generally.¹ This rule applies also to a reference by the testator to persons who are the illegitimate children of others. Hence the fact that the testator describes the illegitimate children of his brother as “*his nephews*,”² or describes the illegitimate children of his mother as “*his sisters*,”³ is not sufficient alone to include them under a gift to children which is thus given or which is contained in another portion of the will. It has also been held that the recognition by the testator, *in a codicil*, of his illegitimate child born after the execution of the will, does not entitle such child to claim under a bequest to children in the will.⁴

In relation to the illegitimate children of another person, it becomes important to consider whether the testator knew of the illegitimacy of the children; for upon this fact frequently depends the decision of the question whether all children, legitimate and illegitimate, are to take, or whether only those who are legitimate shall take under a bequest to the children of the third person. It does not follow that a reference by the testator to a person *as the wife of A.* implies that he believes that the union between her and A. is a legal one, and that their children are legitimate.⁵ If, in fact, the testator knows that the union is illegal, and employs the term “wife” as matter of courtesy, his knowledge of the illegality of the relations exist-

29 Beav. 233. In the last case there was a legacy to *each of the sons and daughters of the late* cousin of the testator, who left two legitimate and two illegitimate sons and one illegitimate daughter. The illegitimate daughter was held to be entitled, as the testator had spoken of the *daughters* of his late cousin in the plural; but the illegitimate sons were excluded, as the terms of the provision for the sons could be satisfied without including them.

¹ Raggett v. Browne, 61 L. T. 463, 465; Harris v. Lloyd, T. & R. 310; Dorin v. Dorin, L. R. 7 H. L. 568, 573, 575; In re Hazeldine, L. R. 31 Ch. D. 511, 517, 54 L. T. 322, 34 W. R. 327.

² Branston v. Weightman, L. R. 35 Ch. D. 551, 56 L. J. Ch. 780, 57 L. T. 42, 35 W. R. 797. See also cases *post*, § 597.

³ Shearman v. Angell, 1 Bailey Eq. (N. C.) 351, 356; *post*, § 599.

⁴ Arnold v. Preston, 18 Ves. 288.

⁵ *Post*, § 601.

ing between the parties is very material. If he *believes* that she is in law, as well as in fact, the wife of the person mentioned, then it is but reasonable to assume that by a devise to her children, or the children of a person mentioned as *her husband*, he means only *legitimate children*; and it has been therefore held that the mere description of the daughter of the testator as the "*wife of J. H.*" will not be enough to comprise her illegitimate children by J. H. under a devise generally to her children, where she was not, in fact, the wife of J. H., which fact the testator knew.¹ On the other hand, if he knew that she was not a legal wife of A., it is very clear that he used the expression, "*wife of A.,*" simply as a term of courtesy, and that, knowing that her children by A. were *all illegitimate*, he intended to give them property as *persona designata*.

Evidence of the knowledge by the testator of the circumstances of the case is always admissible to explain the meaning he attaches to any word. This rule applies where he uses the word "*husband*" or "*wife.*" The question is, Did he mean a lawful wife, or a wife by reputation? And if it is shown that he meant the latter, nothing then exists to prevent *her illegitimate children* from taking, as this reference to her distinctly points them out. It is absurd to suppose that the testator meant that the parties might at some future time legally marry, and that she who is now merely a wife by reputation might become A.'s wife in law, and, as such, have legitimate children by him.²

These considerations, pointed out as influencing the construction of a gift to the children of another, are of much greater pertinency, where the gift is to the children of a testator who has *both legitimate and illegitimate children*. In the absence of statute no rule of law prevents the testator from disposing

¹ In *re Ayles' Trusts*, L. R. 1 Ch. D. 282.

² In *re Horner*, L. R. 37 Ch. Div. 695, 705; In *re Harrison*, 63 L. J. Ch. 385, 70 L. T. 868, 870. Under a gift to "the issue of A.," an illegitimate child, A.'s daughter by M., who was the husband of her deceased sister, was admitted on the grounds, *inter alia*, that the testator had described M. as the "*husband*" of A., and G.

as his "*daughter,*" who was *not* legitimate. This case seems to hold that where the testator *knows of the illegitimacy of the relations of the parents*, he will be presumed to have referred to *illegitimate children*. *Hill v. Crook*, 42 L. J. Ch. 702, L. R. 6 H. L. Cas. 265; In *re Walker*, 66 L. J. Ch. 622 (1897), 2 Ch. 238, 77 L. T. 94.

of his property in favor of his illegitimate children, to the total or partial exclusion of those who are legitimate. It is altogether a question of intention, and, despite the presumption that the word "children," *simpliciter*, means those who are legitimate, if it appears that he intends to benefit only his illegitimate children, the court will respect his intention. Thus, where a man, having abandoned his wife and children abroad, had, during the life-time of his wife, married a woman in America, by whom he had four children, and had made a will in which he designated her as his wife, appointed her a trustee of his property, and devised it all to *his children*, it was conclusively presumed that he intended the illegitimate children, only to take to the exclusion of his legitimate offspring. This would be a just and fair construction, where the legitimate children were able to care for themselves, while the illegitimate children were all minors, and particularly where the second wife was not at fault, and had no knowledge of the existence of a prior marriage.¹ But it has also been held that the circumstance that the testator describes A. as the *eldest daughter* of S., in a gift to her, and also speaks of S. having *daughters*, when he knew she had but *one* legitimate daughter, may indicate that A., who was an illegitimate child of S., should be included in a gift to the children of S.² But generally the mere fact that the testator, in one clause of his will, gives a legacy to his sons John and James by name, who are illegitimate, will not of itself enable them to take under a devise to children generally, where there are legitimate children who can take.³ On this point of recognition by a parent the cases are not harmonious.⁴ In a late case it has been held that an illegitimate child described by the testator as "my son,"⁵ or as "my daughter," and who is also described as the wife of a person whom the testator calls his son-in-law,⁶ would be entitled to take under a residuary clause directing a division of the estate among the testator's children.⁷

¹ Elliott v. Elliott, 117 Ind. 380, 385, 20 N. E. R. 264; Gelston v. Shields, 78 N. Y. 275.

² Smith v. Millidge, 49 L. T. 59.

³ Heater v. Van Auken, 14 N. J. Eq. 167; Bagley v. Mollard, 1 Russ. & My. 581; Fraser v. Pigott, 1 Young, 554.

⁴ Ante, § 573.

⁵ Dickison v. Dickison, 36 Ill. App. 503.

⁶ Walsh v. Brown, 62 L. T. 899.

⁷ "The words used are themselves significant — 'all the children of her body.' At the time these words

§ 575. When illegitimate children may take with legitimate children as a class.—In the cases which have been considered where illegitimate children are included under a devise to children, by reason of naming them, it will be found on consideration that *they take as individuals*.¹ But there can be no legal objection to illegitimate children taking as a class to the same extent as those who are legitimate. Thus, for example, where there was a devise to “*all the natural-born children of A.*,” all the illegitimate children of A. existing at the date of the will were permitted to take.² Again, the intention of the testator to benefit illegitimate children may be expressly shown; where, for example, he devises his property to be equally divided amongst “the children, illegitimate or legitimate, of my brother,” he then knowing that his brother had several illegitimate children.³ In another case, where the gift was by the testator to his children by a woman whom he described as *his wife*, he further providing that they should take in any event “*as if the marriage had been valid according to law*,” and it happened that the marriage was not valid, the children born of the illegal union take as though they were legitimate.⁴

Other terms also used by the testator may indicate that he means illegitimate children to take under a provision for children. Where there is a provision in a will or a marriage settlement for *all* children that have been born or may be born,

were written to express the intention of the testatrix, there had been born of the body of her daughter two children by a former marriage, who are the defendants, and four children who are plaintiffs, and who were the result of that cohabitation between her and S. T. Bostick, the illegality of which is set out in the agreed facts. The testatrix, at the time she executed the will, was living in the house with her daughter and this man towards whom that daughter stood in the relation of a wife in fact, if not in law. An officer of the law, under a duly issued license, had solemnized a marriage between them. She speaks in the will of the husband of her daughter,

evidently meaning this man to whom she no doubt considered her daughter lawfully united. Considered in the light of the surrounding circumstances when it was made, we must conclude that there should not be applied to the interpretation the usual rigid rule” of exclusion. *Sullivan v. Parker*, 113 N. C. 301.

¹ *Ante*, § 573.

² *Metham v. Duke of Devon*, 1 P. W. 529, 530; *Pratt v. Flamer*, 5 Harr. & J. (Md.) 10; *Dane v. Walker*, 109 Mass. 179; *Stewart v. Stewart*, 4 Stew. (N. J.) 899.

³ *Barnett v. Tugwell*, 31 Beav. 232, 236.

⁴ *Bayley v. Snelham*, 5 Ves. 534, 1 Sim. & Stu. 78.

illegitimate children *who are* living at the date of the will are included, but not those subsequently born.¹ So, too, in a more recent case, where the provision was for A. for life, and at her death to *all the children of her body, share and share alike*, the court construed the word "children" to include *living* illegitimate children *as well as those born* after the execution of the will.²

§ 576. **Testamentary provision for unborn illegitimate children.**—In the preceding sections we have construed only the questions whether illegitimate children could take as members of a class among themselves, and whether they shall take under the general designation of children. It now remains to consider, *first*, to what extent, if at all, the testator has power to provide by will for illegitimate children who may *be born after its execution*; and *second*, assuming that he possesses the power, if after-born illegitimate children are included in a gift which expressly or by necessary implication provides for *illegitimate children generally*. Early authorities maintain the proposition that gifts to illegitimate children not *in esse* are not valid,³ and cannot be sustained, though the child is *en ventre sa mere*, where the testamentary provision is expressly for the natural-born children of A. *born of a certain woman*.⁴ It seems that despite some doubt which has been cast upon this rule of the ancient law by modern decisions,⁵ it is still a subsisting and constituent rule of the English law at the present day;⁶ for some very recent English cases expressly hold that no gift to illegitimate children *to be begotten*, no matter in what express terms it may be couched, is valid, though at the same time laying down the rule that a gift to illegitimate children *as a class living at the date of the will*, including those *en ventre sa mere*, may be good.⁷

¹ Hughes v. Knowlton, 37 Conn. 429; Gabb v. Prendergast, 1 K. & J. 439. And in another case it has been held that a devise "*to my beloved wife, and a remainder to my children who shall survive me*," included all the children of the testator by the wife mentioned, though his marriage with her was void. Gelston v. Shields, 16 Hun, 143, 78 N. Y. 275.

² Sullivan v. Parker, 18 S. E. R. 546, 55 L. J. Ch. 398, 54 L. T. 396, 34

347, 113 N. C. 301; Holt v. Sindrey, L. R. 7 Eq. 170, 174.

³ Blodwell v. Edwards, Cro. El. 510.

⁴ Metham v. Duke of Devon, 1 P. W. 529, 530.

⁵ Wilkinson v. Adam, 1 Ves. & B. 422, 446.

⁶ Barnett v. Tugwell, 31 Beav. 232, 236.

⁷ In re Bolton, L. R. 31 Ch. D. 542,

The rule of law adverted to, by which gifts to illegitimate children *to be born, and which are to come into existence*, either *after* the execution of the will, or *after* the death of the testator, is invalidated, was not, as might be supposed, based upon any uncertainty of the beneficiaries; for every class whose members are to be ascertained at some future time of vesting or of distribution would be subject to the same objection. The validity of the provision was disputed and overthrown on other grounds. It was conceived that to permit a testator to provide *in advance for the offspring of an illicit union*, whether entered into by himself or by another person, would be offering a premium on vice, and would be subversive of every true interest of public morality. For this reason the general principle was enforced and has been uniformly sustained. Now it will be observed that in the majority of cases, while the operation of this rule may, upon the whole, advance the interests of society, the rule will work an irretrievable hardship upon the innocent offspring of an illicit connection. It is a rule which usually results in overthrowing the testator's intention, and giving his property to those whom he did not desire should enjoy it. The courts, therefore, will seize upon very slight circumstances to take a case out of the rule. Thus if a man, *after having formed an illicit relation* and having several *illegitimate children born to him*, makes a will by which he provides for all his natural children born or to be born before his death, of *the woman with whom he is living*, it would seem but reasonable to permit all his natural children to participate therein.¹ So, where the testator recognizes the illegitimacy of his relations with a woman, by giving property to his *four "natural" children* by her *by name*, and provides further for any which she may have at his death, his future illegitimate children, born of her, will be included.²

W. R. 525; *Holt v. Sindrey*, L. R. 7 Eq. 170, 174.

¹ *Occleston v. Fullalove*, L. R. 9 Ch. D. 147, 163, 170.

² *Hastie's Trusts*, L. R. 35 Ch. D. 728, 732, 56 L. J. Ch. 792, 57 L. T. 168, 35 W. R. 692. In *Occleston v. Fullalove*, L. R. 9 Ch. D. 147, 163, 170, the testamentary provision was for the

sister-in-law of the testator, M. L., with whom the testator had gone through the ceremony of marriage, and after her death for his reputed children, C. and E., and "*all other children he might have, or be reputed to have, by the said M. L., then born or thereafter to be born.*" The court held, after very much discussion, that an after-born

But it must be said that the English cases are by no means harmonious on this question. A gift by a mother to her own children, "*illegitimate or otherwise*," has been held not to include her illegitimate children born after the execution of the will.¹ And again, where the testator was living with a woman whom he called his wife, and whom everybody supposed was his wife, by whom he had four children, two of whom were dead and one living at the date of the will, and one was born subsequent to its execution, all of whom were illegitimate, because he had another wife living by whom he had no children, the court excluded the natural child born after the execution of the will, and permitted the illegitimate child, living at its execution, to take the whole gift, though in terms it was simply to children as a class.²

§ 577. Provisions for illegitimate children *en ventre sa mere*.—A distinction is made by the cases between the validity of a testamentary gift to an illegitimate child *en ventre sa mere*, where there is *no reference to its paternity*, and a gift to an illegitimate child under similar circumstances, where the testator refers to some particular person as its father. In the former case the gift is unquestionably good. The rule of law which, upon grounds of morality and public policy, invalidates testamentary provisions for illegitimate children *to be born in the future*, has no application to a child *en ventre*, for the child is already actually begotten, and by a fiction is *in esse* for most purposes. Thus Lord Eldon held that, in a case where the testator, though reciting that he *believed* that a woman named, to whom he was not married, was pregnant by him, gave a legacy to the child of which she was *then pregnant*, the legacy was valid, and that the language employed did not constitute a reference to the paternity of the child.³ A legacy to a natural

illegitimate child was entitled to take. This decision was subsequently followed. In *re Goodwin*, L. R. 17 Eq. 345, where the devise was in trust for A., and after her death *for all of the children of the testator by A.*, and there was an illegitimate child born several years after the date of the will, which was acknowledged by its father.

¹ *Howard v. Mills*, L. R. 2 Eq. 389, 391.

² *Lepine v. Bean*, L. R. 10 Eq. 160, 162. In *Wilkinson v. Adam*, 1 Ves. & B. 422, 466, a gift to "the children which I may have by A., living at a certain" date, was held good.

³ *Gordon v. Gordon*, 1 Mer. 141, 151.

child of which a woman is pregnant by a particular man stands upon a different footing. In such cases the paternity of the child is a condition precedent to the vesting and payment of the legacy.¹ While the birth of a child whose mother is the woman mentioned, within such a period subsequent to the execution of the will as to establish conclusively that she was *enceinte* at that date, is a matter comparatively easy of proof, being now customarily matter of record, to prove the paternity of such a child is matter of great difficulty. A natural child is at common law *prima facie filius nullius*, and can only acquire a name by reputation.² The issue of paternity is one which the law cannot *then* inquire into. If the testator describes the natural child of which the woman is *enceinte* as his own, the gift is void; for, as the only motive of his bounty is the fact that he assumes himself to be its father, and as this fact cannot be ascertained or in any manner inquired into, the gift must fail altogether. If the paternity of the child is an implied condition of the testator's bounty, without which the legacy would not have been given, the gift is void. But the cases show conclusively that the intention to make the paternity of the child an essential element of its character as a legatee must appear in language of unmistakable clearness. Accordingly where a testator, after reciting that he had two natural children and that the mother was supposed to be *now* carrying a third, added, "I bequeath the whole of my property — that is to say, if another child is born to the mother of the other two, such child to have one-third," the third child of which the woman mentioned was pregnant was permitted to take with the other natural children, upon the ground that the language contained in the will neither referred to such child as his, nor asserted that he was its father, nor showed that he gave it a legacy solely

¹ "A man cannot provide for the illegitimate children, either of himself or of another, by any reference that involves an inquiry as to their paternity. The law allows no criterion of paternity but marriage. . . . It is true that although the *fact* of paternity cannot be inquired into, the *reputation* of paternity may. The law does not forbid that; and if

we could make out from this will that the testator meant that all children of the woman born during his cohabitation with her should be considered or reputed to be his, they might take." In re Bolton, Brown v. Bolton, L. R. 31 Ch. Div. 542, 553.

² 1 Black. Com. 459; 6 Co. 68; 1 Inst. 3b.

as his child.¹ But if the testator gives a legacy to a natural child of A. of which she is "*now enceinte by me*," or "as she may happen to be enceinte by me," the gift will be void.²

§ 578. **Effect of judicial decree legitimatizing illegitimate children.**—In Georgia a judicial decree by which a child is legitimated under a statutory provision giving the court jurisdiction to grant a decree on proper application, while it may enable a child to take by descent from its putative father, will not enable him to take as a purchaser under a will by which his father is tenant for life, with a remainder to his children.³ The converse of this rule is recognized in Pennsylvania,⁴ where it is held that a judicial legitimation of an illegitimate child will enable her to take under a limitation to lawful issue in a will; and the children of an illegitimate marriage, entered into before she was thus legitimatized, are also lawful issue. In view of the irreconcilable character of these decisions no rule can be laid down. The statute in each instance must be consulted to ascertain how far a judicial legitimation will render illegitimate children competent to take as purchasers under a will. Aside from express statutory rules, we have every right to assume that the testator, in the absence of an express or implied provision for illegitimate children, intended those only shall take who are in fact legitimate, to the exclusion of those whom the law makes legitimate. More particularly, where he provides for his own issue, it is extremely improbable that he intends that the illegitimate children of his son or daughter should take as issue, though made legitimate by statute, to the

¹ Evans v. Massey, 8 Price, 22.

² Earle v. Wilson, 17 Ves. 528. In this case Sir W. Grant said: "Suppose the words 'as she may happen to be *enceinte* by me' could be taken to mean 'as she is now *enceinte* by me,' in which there is considerable difficulty; yet if the rule of law does not acknowledge a natural child to have a father before its birth, the change of phrase would not have the effect of making the bequest good. He means to give to an unborn bastard by a description which the law says such person cannot answer; and if you take away that part of the de-

scription, *non constat* that the gift would ever have been made."

³ Hicks v. Smith, 94 Ga. 809, 819.

⁴ Miller's Appeal, 52 Pa. St. 113, 115. An illegitimate child who is made legitimate by statute is an heir to his father within the meaning of the phrase "dying without an heir." McGunnigle v. McKee, 77 Pa. St. 81, 85. An illegitimate child cannot take under a provision for children, though under a statute such an illegitimate child would take as the heir of its mother, equally with the lawful children. In re Scholl's Estate, 76 N. W. R. 616.

partial exclusion of his own children and grandchildren who are legitimate. Such illegitimate issue have no claim upon him, either in law or morals, and the fact that they are enabled to take by descent from *their* father or mother by statute raises no presumption that the testator meant them to take as purchasers by a provision for his own issue.¹

¹ Under the statute which provides that an illegitimate child, whose parents have intermarried, shall be legitimate and entitled to the rights of a legitimate child, the court held that an illegitimate child of the son of the testator, born after testator's death, was entitled to take under a provision for his grandchildren. *Smith v. Lansing*, 53 N. Y. S. 633, 24 Misc. R. 566. A testator who resided in the state of Massachusetts devised property to A. and his present wife for the benefit of him and his wife and child. A. subsequently procured a divorce, which was in-

valid because of a lack of jurisdiction by the court, and subsequently married a woman by whom he had already had an illegitimate child. The Massachusetts court held that the validity of the decree of divorce could be inquired into, and, being invalid, the subsequent marriage was also void and did not legitimize the illegitimate child, as it would have done in the state (California) where it was contracted, if it had been valid. This child therefore took nothing by the will. *Adams v. Adams*, 154 Mass. 290, 28 N. E. R. 260.

CHAPTER XXVII.

WHEN "CHILDREN" IS A WORD OF LIMITATION—THE RULE IN WILD'S CASE.

§ 579. The word "children" when used as a word of limitation.

580. The rule in Wild's Case.

581. When children must be living.

582. Immediate devise to the parent and children when the children are living.

§ 583. Whether gift to "A. and his children" is immediate or in remainder to the children.

584. Whether the rule in Wild's Case is applicable to personal property.

§ 579. The word "children" when used as a word of limitation.—The construction of the word "children" employed as a term of purchase has been very fully considered in another portion of this work, where the principles which govern it have been stated at full length.¹ But "children" or "child" may be employed as a word of limitation as well as a word of purchase. When it is found alone in a will without being collocated with "heirs of the body" or "issue," and also without any limitation over on a failure of issue, it is usually a word of purchase. In fact, in the great majority of cases in which this word or its equivalent, "sons" or "son," appears in wills, it is a word of purchase and not a word of limitation. The courts will in cases of doubt favor the rule by which it is held to be a word of purchase, giving those who answer to the description of children a direct interest under the will, and not one which is merely derivative from a parent.

But whether the word shall be regarded as a word of purchase or as a word of limitation is altogether a matter of ascertaining which the testator intended it to be. With this word, as with the similar words "heirs," "issue," "next of kin," no general rule can be laid down which will show when they are words of limitation and when words of purchase. But there is one well-defined class of cases in which the word "chil-

¹ See §§ 546–569.

dren" is always regarded as a word of limitation, which we will now consider.

§ 580. **The rule in Wild's Case.**—If the testator shall devise land to *A. and his children*, and the person named as the parent has *no child at the date of the will*, the devise will confer upon A. an estate tail. The word "children" will here be regarded as a word of limitation, not of purchase, and equivalent to "heirs of the body" of the person mentioned as the parent. But in order that such a construction may be had, it must clearly appear that the testator did *not intend to create a life estate in the parent*, with an executory gift to the children as purchasers after the parent's death; for if he did, the word "children" is a word of purchase, and the children will take as remaindermen. This is a very ancient rule of the English common law, commonly called the rule in Wild's Case.¹

It is also received in the United States as a part of the law of real property, with this modification: that, in those states where estates in fee-tail have been abolished by statute,² a devise of an estate to A. and his children would give a fee-simple to A.³

¹ 6 Rep. 17.

² *Post*, § 654.

³ *Nimmo v. Stewart*, 21 Ala. (1852), 682, 691; *Wiley v. Smith*, 3 Ga. (1847), 551; *Jossey v. White*, 28 Ga. 270, 271; *Sandford v. Sandford*, 58 Ga. (1877), 260; *King v. Rea*, 56 Ind. 1, 17; *Rigg v. McCarty*, 86 Ind. 352; *Moore v. Gary*, 149 Ind. 51, 58, 48 N. E. R. 630; *Lofton v. Murchison*, 80 Ga. 391, 392, 7 S. E. R. 322; *Lachland's Heirs v. Downing*, 11 B. Mon. (50 Ky.) 32, 34; *Moran v. Dillehay*, 8 Bush (Ky.), 434, 440; *Williams v. Duncan*, 92 Ky. (1891), 125, 131, 17 S. W. R. 330; *Carr v. Estill*, 16 B. Mon. (55 Ky.) 309; *Hood v. Dawson*, 92 Ky. 285, 290, 33 S. W. R. 75; *Blankenbaker v. Woodruff*, 97 Ky. 277; *Baker v. Scott*, 62 Ill. 86; *Beacroft v. Strawn*, 77 Ill. (1875), 28, 33; *Schaefer v. Schaefer*, 141 Ill. 333, 31 N. E. R. 136; *Allen v. Hoyt*, 5 Met. (Mass.) 324, 328; *Nightingale v. Burrell*, 15 Pick. (Mass.) 104,

114; *Wheatland v. Dodge*, 10 Met. (51 Mass.) 502, 504; *Akers v. Akers*, 23 N. J. Eq. 26, 29; *Jones v. Jones*, 13 N. J. Eq. 236, 238; *Stokes v. Tilly*, 9 N. J. Eq. (1852), 137; *In re Saunders*, 4 Paige (N. Y., 1834), 293, 297; *Hannan v. Osborn*, 4 Paige (N. Y., 1834), 336, 341; *Rogers v. Rogers*, 3 Wend. (N. Y.) 503; *Chrystie v. Phyfe*, 19 N. Y. 344, 353; *Silliman v. Whittaker*, 119 N. C. 89, 93, 25 S. E. R. 742; *Moore v. Leach*, 5 Jones' (N. C.) L. 88; *Jenkins v. Hall*, 4 Jones' Eq. (N. C.) 334; *McKee's Estate*, 104 Pa. St. 571; *Guthrie's Appeal*, 37 Pa. St. 9, 21; *In re Cressler's Estate*, 29 Atl. R. 90, 95, 161 Pa. St. 427, 434; *Cote v. Bonnhorst*, 41 Pa. St. 243; *Johnson v. Johnson*, *McMullan* (S. C., 1842), Eq. 345; *Reader v. Spearman*, 6 Rich. Eq. (S. C., 1853), 88, 93; *Mosby v. Paul*, 88 Va. 533 (1892); *Moon v. Stone*, 19 Gratt. (Va., 1869), 130; *Merryman v. Merryman*, 5 Munf. (Va.) 550; *Smith v. Fox's Adm'r*, 82

§ 581. When children must be living.—The basis of the rule is, in the first instance, the intention of the testator or grantor *to benefit the children* of A. The rule, as it is defined and formulated in the early English cases, demands that there shall be no children living at the time of the devise in order that it shall apply, and the word be taken as a word of limitation. Thus, where the testator devised the fee-simple of his estate to his son and to *his children*,¹ or to his grandson and *his children forever*,² and the son and the grandson respectively had no children living at the date of the devise or at the death of the testator, it was held that each took an estate tail. It would seem also that the fact that the person whose children are to take had a child living *at the death of the testator*, would not prevent the application of the rule where such person had none living at the date of the will.³ The modern cases have modified the rule in this respect, and it is now usually applied *only where there are no children living at the death of the testator*, when the will goes into effect.

For to apply it only to a case where the parent had no children living at the date of the execution of the will, and thus to give him an estate in fee-tail, which by the statutes in the United States is converted into a fee-simple, would possibly, if there were children subsequently born to him who were living at the death of the testator, have the effect of depriving them of all benefit, contrary to the clear intention of the testator. For if the word "children" is to be construed as a word of limitation, and the parent is to take the fee, he will be able to alienate the fee-simple of the estate. Now it is apparent in most cases of this kind that the testator intended a direct benefit to the children, and hence, if a child is living at his death, he ought to take as a purchaser, and no necessity of applying the

Va. 763, 1 S. E. R. 200; Graham v. ham, 2 W. Bl. 1093; Cook v. Cook, 2 Graham, 4 W. Va. 320; Parkman Vern. 545; Hughes v. Sayer, 1 P. W. v. Bowdoin, 1 Sumn. 359, 364, 371; 534; Seale v. Barter, 2 Bos. & Pul. 485, King v. Melling, 1 Vent. 214, 225; 493.
Wood v. Baron, 1 East, 259; Davie v. ¹Davie v. Stevens, Dougl. (Eng.) 321.
Stevens, 1 Doug. 321; Oates v. Jack- 321.
son, 2 Strange, 1171, 1172; 6 Cruise ²Broadhurst v. Morris, 2 Barn. & Dig., tit. 38, ch. 12; Buffar v. Brad- Ad. 1.
ford, 2 Atk. 220; White v. White, ³Seale v. Barter, 2 Bos. & P. 485, Willes, 348, 353; Wharton v. Gres- 487.

rule would arise. So, also, if a child was born to the parent subsequently to the execution of the will, and this child should survive the testator, and was competent to take as a purchaser, while the parent had died during the life-time of the testator, the devise would lapse, in the absence of statute, as a consequence of holding the word "children" to be a word of limitation. Applying the rule in Wild's Case, which gives the parent an estate in fee-simple or fee-tail, by construing "children" as equivalent to "heirs of the body," the estate would then, in the absence of statute, lapse by the death of the parent during the life-time of the testator, and his intention that the children should take the benefit would be overthrown.¹

§ 582. Immediate devise to the parent and children when children are living.— While one clause of the rule in Wild's Case sustains the principle that, where lands are devised to a person and his children simply, and he has no children at the date of the devise, or at the date of the will, who can take as purchasers, he shall take an estate in fee-tail, another portion of it lays down the rule that in the case of a devise in those terms, *if there be children at the death of the testator*, the parent and the children will take together as purchasers as *joint tenants*, according to the nature of the estate.² If the devise to A. and his children is in indeterminate language, no words of inheritance being used, they will, with the parent, take at common law a joint estate for their lives;³ though, under the modern statutes, the parent and the children would take, usually as tenants in common, all the interest of the testator in the land disposed of, in the absence of a contrary expression of intention in the will.⁴

¹ Buffar v. Bradford, 2 Atk. 220.

² Oates v. Jackson, 2 Stra. 1172. The language of Lord Coke in Wild's Case is as follows, referring first to the construction by which an estate tail is created: "The intent of the testator is manifest and certain that his children (or issue) should take, and as immediate devisees they cannot take, because they are not *in rerum natura*; and by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate; therefore

such words shall be taken as words of limitation." 6 Rep. 17. It is also stated "that if a man devise land to A. and his children or issue, and he then have issue of his body, there his express intent may take effect according to the rule of the common law, and no manifest and certain intent appears in the will to the contrary; and therefore, in such case, they shall have but a joint estate for life."

³ See cases in next note.

⁴ Dunn v. Bank, 2 Ala. (1841), 152,

For, of course, in those states where joint tenancy is by statute expressly abolished, such a limitation would result in creating a tenancy in common in the parent and the children living at the death of the testator.¹

In this class of cases the question frequently arises whether the testator intends to create an estate in joint tenancy among the parent and children, or whether he intends to give the parent a life estate with a remainder to the children. In either case the word "children" is a word of purchase under the second half of the rule in Wild's Case. But in the one instance the gift to the children is always immediate and vested, and *all take concurrently*; while in the other instance it is always executory, and parent and children take in succession. So in some instances it may be contingent on the children surviving the parent.² If the gift is to the parent, either expressly *for life*, or at common law without *words of limitation*, and the gift to the children is to *them and their heirs*, or in any terms which would convey the fee to the children, it is evident that the testator could not have meant them to take as joint tenants. He must have intended a life estate in the parent and a remainder in fee in the children as purchasers. This would be the case where the gift was to the parent for the benefit of herself, and *after her death to go to her children*.³

156; Utz's Estate, 43 Cal. (1872), 200, 204; Lord v. Moore, 20 Conn. (1849), 122, 126; Hoyle v. Jones, 30 Ga. 40; McCord v. Whitehead (Ga.), 25 S. E. R. 767; McRea v. Dutton, 95 Ga. 267, 22 S. E. R. 149; Barclay v. Platt, 48 N. E. R. 973, 170 Ill. 384, 387; Moore v. Gary, 48 N. E. R. 630, 149 Ind. 51, 53; Noble v. Temple (Kan.), 49 Pac. R. 598; Proctor v. Smith, 8 Bush (Ky.), 81, 84; Weaver v. Weaver's Ex'rs (Ky.), 18 S. W. R. 228; Annable v. Patch, 3 Pick. 360; Allen v. Hoyt, 5 Met. (Mass.) 324; Stevens v. Barrow (Ky., 1896), 46 S. W. R. 686; Hamilton v. Pitcher, 53 Mo. 334; Jones v. Jones, 13 N. J. Eq. 23; Graves v. Graves, 55 Hun, 58, 8 N. Y. S. 284; Moore v. Leach, 5 Jones' (58 N. C., 1860) Eq. 88; Gay v. Baker, 5 id. 344; Hunt v. Satterwhait, 85 N. C. 73, 75; Hampton v. Wheeler, 99 N. C. 222, 6 S. E. R. 236; Silliman v. Whitaker, 119 N. C. (1896), 89, 93; Cressler's Estate, 149 Pa. St. 427, 434; Graham v. Flower, 13 Serg. & R. (Pa.) 439; McKeehan v. Wilson, 53 Pa. St. (1866), 74; Shirlock v. Shirlock, 5 Pa. St. (1846), 367; Cannon v. Apperson, 14 Lea (Tenn.), 553; In re McIntosh's Estate, 27 Atl. R. 1044, 158 Pa. St. 528, 27 Atl. R. 1047, 158 Pa. St. 528, 27 Atl. R. 1048, 158 Pa. St. 528.

¹ Ante, § 539.

² Compare ante, §§ 553, 554.

³ Jaffrey v. Honeywood, 4 Mad. 398; Lewis v. Citizens' Bank, 95 Ky. 79, 23 S. W. R. 667. A residuary gift to the daughter of the testatrix, in general language, for the *sole use of herself and children*, gives the daughter

§ 583. Whether gift "to A. and his children" is immediate or in remainder to the children.—Whether by a devise which is expressly and in terms to A. and his or her children, or for the benefit of A. and his or her children, the testator intends an immediate gift to the parent and the children to be enjoyed concurrently, or whether he intends to give a life estate to the parent with a remainder to the children, has been referred to in the last section. It is a question of the intention of the testator, to be determined on the language of the will; and, as no two wills are exactly alike in language, the question presents great difficulty.

If the estate is devised expressly for the benefit of the parent and her children, no express reference being made to the postponement of the possession of the children until after the death of the parent, it would seem reasonable to assume that the testator intended that all should take concurrently.¹ This is the ordinary construction where children are living at the death of the testator, and there is nothing in the will to indicate that they and the parent should take otherwise than concurrently and as joint tenants. It is supported by the English and American cases.² But the courts have also held that by a devise to A. for the benefit of himself and his children, the testator intended that A. should take a life estate with a remainder in fee to the children.³

the fee-simple, and the words mentioned do not make the children tenants in common with her, nor vest in them a remainder at her death. *Small v. Field*, 14 S. W. R. 815, 102 Mo. 104.

¹ *Pyne v. Franklin*, 5 Sim. 458; *Newill v. Newill*, L. R. 7 Ch. 253, L. R. 12 Eq. 432.

² See § 582.

³ *Furlow v. Merrell*, 23 Ala. (1852), 705, 716; *Crawford v. Forrest*, 77 Fed. R. 534; *In re Saunders*, 4 Paige (N. Y.), 293; *Rich v. Rogers*, 14 Gray (Mass.), 174, 178; *Goss v. Eberhart*, 29 Ga. (1859), 545; *Faribault v. Taylor*, 5 Jones' Eq. (N. C.) 219, 220. It would seem at first glance that a devise to A. and his children, or to A. for the benefit of himself or herself and chil-

dren, would create an estate to be taken concurrently, not in succession. But where the object of the testator is to provide for the support of A. during his or her life, it has been generally held that A. will take a life estate with a remainder to the children. This construction would be favored where the devise is to the widow of the testator "for the benefit of herself and her children:" for if all take concurrently, any child might demand partition when he or she became of age, which would result in depriving the widow of the testator of the support for the remainder of her life, which he evidently meant to give her. So, too, it has been considered that the circumstance that the devise is in trust

And such a construction will be materially aided if a devise over is inserted, to take effect in the event that the parent shall leave no children *him surviving*.¹ The testator may, of course, by express language avoid the operation of the rule that a devise to A. and his children shall make them joint tenants, and that they shall take concurrently, by language which, either expressly or by implication, points out that he intends them to take in succession.

The strongest indication of such language would be where, after giving an estate to A. and his children, he provides that it shall be enjoyed by the parent during his life, and that it shall go after his or her death to the children.² In all these cases the word "children" will be construed as a word of purchase, irrespective of the fact that the parent *had or had not children at the time of the making of the will*.³

Very slight circumstances are usually permitted to rebut the

for the wife of the testator and her children may indicate that he intended she should take a life estate; that is to say, the income of the whole property for her life to be paid by the trustees, with a vested remainder in the capital at her death for the children. *Rich v. Rogers*, 14 Gray (Mass.), 174, 178; *Weaver v. Weaver*, 92 Ky. 491; *Chusnet v. Meares*, 3 Jones' (N. C.) Eq. 416, 419. The cases distinguish between a devise to "A. and her children, *if she shall have any*," and a devise to A. and *her children at her death*. In the first class of cases the testator means, if the parent shall have any children living at his death or at any time during her life, that parent and children shall take as joint tenants or tenants in common. In the second class of cases he means to give the parent a life estate, with a remainder to her children who are living at her death. *Gillespie v. Sherman*, 62 Ga. 252; *Silliman v. Whitaker*, 119 N. C. 89, 95.

¹*Schaefer v. Schaefer*, 141 Ill. 337 (1893), 31 N. E. R. 136.

²*McCroan v. Pope* (1850), 17 Ala. 612, 616; *Furlow v. Merrell*, 23 Ala. 705, 716; *Goss v. Eberhart*, 29 Ga. 545; *Kelly v. Gonce*, 49 Ill. App. 82; *Peckham v. Lego*, 57 Conn. 553, 19 Atl. R. 392; *Moore v. Hare* (Ind., 1896), 43 N. E. R. 870; *Mercantile Bank v. Ballard's Assignee*, 83 Ky. (1885), 481; *Demill v. Reid*, 71 Md. (1889), 175, 192, 17 Atl. R. 1014; *Dodd v. Winship*, 144 Mass. 461, 464, 11 N. E. R. 588; *Hubbard v. Selser*, 44 Miss. (1870), 704, 712; *Rhodes v. Shaw* (N. J.), 11 Atl. R. 116; *Huber v. Donohue*, 49 N. J. Eq. 125 (1891), 23 Atl. R. 495; *Budd v. Haines*, 52 N. J. Eq. 488 (1894), 29 Atl. R. 170; *Losey v. Stanley*, 147 N. Y. 560, 42 N. E. R. 8; *Perry v. Lowber*, 49 Pa. St. 483 (1862); *Cote v. Von Bonnhorst*, 41 Pa. St. (1861), 243; *Harris v. McElroy*, 45 Pa. St. 216; *Springer v. Arundel*, 64 Pa. St. 214; *Christie v. Phyfe*, 19 N. Y. 344, 354; *Barker's Estate*, 159 Pa. St. 518, 28 Atl. R. 368; *Reeder v. Spearman*, 6 Rich. (S. C.) Eq. 88.

³*In re Saunders*, 4 Paige Ch. (N. Y.) 293, 297.

presumption that the testator, in a devise "to A. and his children" simply, used the word as a word of purchase, indicating an intention that they shall take concurrently with the parents; particularly in the case of a devise of personal property, as, for example, of money for the use and benefit of the parent and his children. If, in a bequest of personal property, the testator provides that the legacy to A. and his children shall be secured for their use,¹ or where the children are to take in unequal shares with the parent,² or where a trustee is appointed for the parent and the children,³ the person named as the parent will enjoy the income of the legacy for life, and at his death the capital will go to his children as remaindermen. And generally, in a gift of personal property, where the testator directs that after the death of the parent it shall be paid over to the children, the parent will take a life estate, unless it is clearly to be seen from the context that the testator intended him or her to have an absolute interest.⁴

§ 584. Whether the rule in Wild's Case is applicable to personal property.—The earlier cases decided in the English courts of chancery refused to apply the first clause of the rule in Wild's Case to gifts of personal property. If the gift of money, leaseholds, etc., was made to A. and his children, and he had none at the death of the testator, the application of the rule would give him an absolute title to the personal property; for it is a rule of common law that language which creates a fee-tail in real property will give the absolute title to personal property.⁵ And the result of construing the word "children" as a word of limitation would be that the parent would have the whole interest and could alienate without the consent of the children.⁶ Whether the rule is applicable to personal property is not of paramount importance; for, if it be not applicable, still the absolute interest in the personal property will pass without words of limitation, both at common law and now par-

¹ Vaughan v. Marquis of Headfort, 10 Sim. 639; Combe v. Hughes, L. R. 14 Eq. 415.

² Armstrong v. Armstrong, L. R. 7 Eq. 522.

³ Morse v. Morse, 2 Sim. 485. See also note 2, p. 775.

⁴ Hughes v. Drovers & Mechanics' Nat. Bank (Md.), 38 Atl. R. 936.

⁵ 2 Black., p. 398.

⁶ Buffar v. Bradford, 2 Atk. 220; Audsley v. Horn, 1 D. F. & J. 226, 26 Beav. 195; Heron v. Stokes, 2 Drew. & W. 89.

ticularly, under the various statutes existing in England and America. An exception to this rule occurs in the case of an annuity, which, if given without words of inheritance or limitation, is conclusively presumed to be for the life of the annuitant.¹ And under the rule that an estate in tail cannot be created in an annuity, the limitation of an annuity to A. and her children would simply create a conditional fee in the annuity.²

¹Savery v. Dyer, Amb. 139; Yates v. Maddan, 3 M. & G. 332.

²Stafford v. Buckley, 2 Ves. 170.

CHAPTER XXVIII.

GIFTS TO FAMILIES AND RELATIONS AS PURCHASERS.

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| <p>§ 585. Definition of the word "family"—Gifts to families, when void for uncertainty.</p> <p>586. The word "family" may be equivalent to "heir."</p> <p>587. The word "family" may be equivalent to "children"—When the head of the family is included.</p> <p>588. The word "family" may mean relations or next of kin.</p> <p>589. Definition of the word "relations" as statutory next of kin.</p> <p>590. "Relations" presumed to mean</p> | <p>those by consanguinity—Husband and wife, when included among relations or next of kin.</p> <p>§ 591. Gifts to relation in the singular—When illegitimate relations are included.</p> <p>592. Provisions made for the poor or needy relations of the testator.</p> <p>593. Powers of distribution among relations.</p> <p>594. Distribution among relations as a class is usually <i>per capita</i>.</p> |
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§ 585. Definition of the word "family"—Gifts to families, when void for uncertainty.—The meaning of the word "family" is always to be gathered from the whole will, read in the light of the circumstances surrounding its execution. It is a word of very flexible meaning, depending upon the intention of the testator. It is often difficult to determine what persons he intends to be included under the term.

The word has several ordinary, and, we may say, primary meanings. It may mean those who live under the same roof with the *pater familias*;¹ that is, *his household, his wife, children and servants*. This is not its ordinary meaning as used in wills.² It may also mean a man's wife and children, and this is a very common meaning in wills. Again, the word is often used, particularly where a person, whose family is spoken of,

¹ Dodge v. Railroad Co., 154 Mass. 299.

² "A mere aggregation of individuals under one common roof or within the same curtilage, although devoting their attention to a common object, the promotion of their mutual interest and social happiness,

as the inmates of a boarding-house or persons employed in the capacity of servants, does not of itself constitute a family." Roco v. Green, 50 Tex. (1878), 483, 490; Putnam v. Southern Pac. R. Co., 27 Pac. R. 1033, 21 Oreg. 230.

has *no wife or children*, to indicate his or her brothers and sisters, or his statutory next of kin; and sometimes, in a very wide sense, to indicate the family stock; that is, those persons of the same name who are descended from a common, though remote ancestor.¹

Under some circumstances a gift of personal property to the family of the testator, or to the family of some other person, may be void for uncertainty as to whom the testator intends.² Thus, where the testator gave a remainder in personal property to be divided among her daughters and "*their husbands and families*,"³ where the gifts were "to T. H. forever, hoping *he will continue them in the family*,"⁴ where the gift was one-half to the *family of the testator's wife* and one-half to *his brothers' and sisters' family* equally to be divided,⁵ the gift is void for uncertainty. The cases in which a provision for a family has been held void for uncertainty are not numerous, and the courts, in modern times particularly, strain after a construction which will make a gift to a family effectual.⁶

§ 586. The word "**family**" may be equivalent to "**heir**." In England, from the time of Lord Hobart, it has been a rule

¹ "The word 'family' may mean a man's household, consisting of himself, his wife, children and servants; it may mean his wife and children, or his children excluding his wife; or, in the absence of wife and children, it may mean his brothers and sisters or next of kin; or it may mean the genealogical stock from which he may have sprung." 2 Story, Eq. Jur., § 1065b. "The general meaning of a term in question obtains of course in wills only where it is not interpreted by the context." O'Hara on Int. of Wills, 317.

² Liley v. Hey, 1 Hare, 500; Lambe v. Eames, L. R. 10 Eq. 267; Williams v. Williams, 1 Sim. (N. S.) 358, 371; Gregory v. Smith, 9 Hare, 708; Chapton v. Bulmer, 10 Sim. 426; Hess v. Singler, 114 Mass. (1873), 56, 59; Andrews v. Bank, 3 Allen (Mass.), 313; Beales v. Crisford, 13 Sim. 592; Parkinson's Trust, 1 Sim. (N. S.) 242.

³ Robinson v. Waddelow, 8 Sim. 134. "The word 'family' is an uncertain term; it may extend to grandchildren as well as children. The most reasonable construction is to reject the words 'husbands and families.'" By the court on page 137.

⁴ Harland v. Trigg, 1 Bro. C. C. 142, 144.

⁵ Doe d. Hayter v. Joinville, 3 East, 172. The testator had two sisters, one of whom died before him, leaving children, and the other survived him and had children, and he had also one brother surviving who had six children; the gift was void because the court could not say who was meant by the term. See also Neo v. Neo, L. R. 6 P. C. 381. In Tolson v. Tolson, 10 Gill & J. (Md., 1838), 139, the testator "requested his seven sons to take care of their brother A. and *his family*."

⁶ 2 Redfield on Wills, p. 72.

that the word "family," in a *gift of real property*, whether in possession or in remainder, shall be conclusively understood to mean the heir. This construction is due, in the *first* place, to a great desire to avoid intestacy, and *secondly*, to the favor with which the English courts regard the heir-at-law.¹

Thus, a devise of all the testator's real estate to A., "*in the fullest confidence that she would devise the property to his family,*" is certain and valid, and a precatory trust arises² for the benefit of the testator's heirs.³ So a gift of land for the purpose of aiding any member of *my family who may be in distress* is certain and valid.⁴

Where a testator speaks of *his* family under circumstances where it is synonymous with his heir, he will be presumed to mean the person who is his heir at his death.⁵ But when he speaks of the family of *another*, he may mean, not the heir of that person, but the *heir apparent at the date of the execution of the will*.⁶

§ 587. The word "family" may be equivalent to children when the head of the family is included.—In most cases the court will construe the word "family" to mean children. If the testator, being married, and leaving a wife and children, gives his wife a sum of money for the benefit of his family, he may mean his children only; for when *a married man mentions his family*, he usually means his children alone.⁷ So, a provision for the *support of the family of the testator* was held

¹ Chapman's Case, Dyer, 333b. If land be devised to the stock, or family, or house of A., it shall be understood of the heir principal of the person. Counden v. Clerke, Hob. 29, 33a. "The term 'family' primarily means children as regards bequests. In devises of realty, 'family' means heirs, or heirs of the body. The word 'family,' however, will often be construed to mean relatives rather than children. The general meaning of a term obtains, of course, in wills only where the term in question is not interpreted by the context." O'Hara on Int. of Wills, 317.

² Post, § 792 et seq.

³ Wright v. Atkins, 17 Ves. 255;

Griffith v. Evans, 5 Beav. 241; Ward v. Peloubet, 10 N. J. Eq. (1855), 304; Lutte v. Bennett, 5 Jones' Eq. (N. C.) 156; Poor v. Insurance Co., 125 Mass. 274, 277.

⁴ Hill v. Bowman, 7 Leigh (Va., 1836), 650.

⁵ See § 610.

⁶ Doe d. Chattaway v. Smith, 5 Maule & Sel. 126. A devise to "A. and B., and to their respective families by way of seniority," gives an estate in fee-tail to A.'s sons, according to seniority, at the death of the testator. Lucas v. Goldsmid, 29 Beav. 657, 660.

⁷ In re Hutchinson, L. R. 8 Ch. Div. 540.

to be for the benefit of his widow and his children, or their immediate descendants, so long as they reside together in one household.¹ If some of the children are self-supporting, while others are minors living with their mother, it will be presumed that he did not intend to include those who could support themselves.²

The word "family" will be construed to mean children, where a testator gives property to the family of another, if from the context, and because of the fact of the property being personal, it is apparent that the testator did not mean heirs. Where a testator gave the proceeds of his property "*to the families of Cyrus and John Griffin, children in equal proportion,*"³ or to be divided between his "*brother A.'s family and B.,*"⁴ to the families of *my brother A.'s four children, and to the children of my sister B.,*⁵ "to be divided among my cousins and *their respective families,*"⁶ or for the support of "*A. and her family,*"⁷ it was held that he meant children of the persons named, who for that reason take *per stirpes*. A direction to divide money "among all of the testator's *family who should be living*" at a date mentioned means among his children to the exclusion of his grandchildren.⁸ Whether a gift to A. and his family, or to A. and her family, includes the husband or

¹ Bowditch v. Andrews, 8 Allen (Mass.), 339, 341.

² In re Simon's Will, 55 Conn. (1887), 239, 242, 11 Atl. R. 36. Where the testator had married twice, his second wife surviving him, and he gave a fund equally to be divided *between the families of himself and his first wife, and himself and his second wife*, it was held that he meant only those of his children (excluding grandchildren whose parents were deceased) by his different wives who were living with him when the will was made, each family to form a class and to take *per stirpes*. Townsend v. Townsend, 156 Mass. (1892), 454, 457, 31 N. E. R. 632.

³ Walker v. Griffin, 11 Wheat. (24 U. S.) 875, 380.

⁴ Silsby v. Sawyer, 64 N. H. 580, 585, 15 Atl. R. 601.

⁵ Allen's Succession, 48 La. Ann. 1036.

⁶ In re Terry's Will, 19 Beav. 580, 582.

⁷ Woods v. Woods, 1 M. & Cr. 401.

⁸ Pigg v. Clarke, L. R. 3 Eq. 672, 674. See Whelan v. Reilly, 3 W. Va. 610; Dominick v. Sayres, 3 Sandf. Ch. (N. Y.) 555; In re Muffett, 55 L. T. 671; Wood v. Wood, 3 Hare, 65; Blackwell v. Bull, 1 Keen, 176; Parkinson's Trusts, 1 Sim. (N. S.) 242; Beales v. Crisford, 15 Sim. 592. Where a gift was "unto my brothers and sisters equally, and to the *families of such as are dead,*" it was held that families did not include grandchildren; but that sons and daughters of brothers and sisters took *per stirpes* as joint tenants. Battersby's Trusts (1896), 1 Ir. R. 600.

wife of A., has been much discussed. It depends always on the intention as expressed in the will. A power to appoint for the benefit of a married woman and "her family" might not include her husband,¹ while a gift to A. for the *support of himself and his family* includes his wife and children,² but not step-children.³ A gift to the sons and daughters of the testator in equal shares, and "for *their families if they have any*," is for the benefit of sons and daughters and their children so long as they live together in one household, and the wife of any son so long as *she* resides with her husband.⁴

A gift to the family of A., *simpliciter*, includes A. himself, unless he is excluded by express words or necessary implication, in which case only his children are meant.⁵ Under a bequest to the "families of Gregory and Geare," *simpliciter*, the children of persons of that name are entitled, but not the parents.⁶ Where a testator gave money to "A. and his family *jointly*," the last word is used in a loose and vague sense and does not create a joint tenancy. The money should be equally divided among A., *his* wife and *their* children living at the death of the testator, excluding an after-born child.⁷

§ 588. The word "family" may mean relations or next of kin.—The word "family," in a gift of property to the family of the testator, who had no children, and whom it was

¹ MacLeroth v. Bacon, 5 Ves. 159, 167; Hook v. Clippinger, 5 Pa. St. 385, 389. If there is a gift to A. individually, and *another* gift to his family, his wife is excluded and his children take all. Wood v. Wood, 3 Hare, 65, 66.

² Chase v. Chase, 2 Allen (Mass.), 101, 103; Addison v. Bowie, 2 Bland (Md.), 606; Osgood v. Lovering, 33 Me. 464, 467 ("for the benefit of the family"). All of the children are included, and not merely such of the children as may have survived the testator, where the gift to the family was in fee-simple. Taylor v. Watson, 35 Md. (1871), 519.

³ Bates v. Dewson, 128 Mass. 334, 335.

⁴ Bradlee v. Andrews, 187 Mass. 50, 55.

⁵ Bowditch v. Andrews, 8 Allen (Mass.), 339, 341; Phelps v. Phelps, 145 Mass. 570, 574; Pigg v. Clarke, L. R. 3 Ch. D. 672, 674; In re Mulqueen's Trusts, 7 L. R. Ir. 127; In re Hutchinson, 8 Ch. Div. 540.

⁶ Gregory v. Smith, 9 Hare, 708, 711; Barnes v. Patch, 8 Ves. 604, 609; Wallace v. Micken, 2 Disney (Ohio), 564, 569. Where a testator gave a remainder to "my sister A.'s family," and a specific gift to one of A.'s children, it was held that by family he meant children, *including the specific legatee*. Reay v. Rawlinson, 29 Beav. 88, 90.

⁷ Langmaid v. Hurd, 64 N. H. 526, 527, 15 Atl. R. 130; Cosgrove v. Cosgrove (Conn., 1887), 38 Atl. R. 219; Owen v. Penny, 14 Jur., Pt. 1, 359.

extremely improbable would have any,¹ or to the family of a person whom the testator *knows to be unmarried*, can only mean kindred or relations of those persons.² This construction is strengthened by the fact that the situation of the person makes it improbable that there shall be children; or that the testator had not the future birth of children to that person in his mind when making the will.³

Under such circumstances, where "family" is equivalent to "relations," and the donee has a power of selection, she need not confine herself to the statutory next of kin, but may select others.⁴ Thus, where a testator gave personal property absolutely to his wife, with a request that she dispose of it among her children, and an expression that he should be unhappy if he thought any *one not of her family* should benefit thereby, Lord Cranforth held that the words "*her family*," while ambiguous, were not confined to children, but meant posterity or descendants, and also that no trust was intended.⁵

The meaning of the phrase "younger branches of the family of A." depends upon the situation of A. as regards his fam-

¹ In re Maxon, 4 Jur. (N. S.) 307.

² Gafney v. Kennison, 64 N. H. 354, 357.

³ Cruwys v. Colman, 9 Ves. 319, 324, 19 Beav. 581; Grant v. Lynam, 4 Russ. 292; Snow v. Teed, L. R. 9 Eq. 622, 623.

⁴ Snow v. Teed, L. R. 9 Eq. 622, 623.

⁵ Williams v. Williams, 1 Sim. (N. S.) 358. On page 371 it is said: "The word 'family' is one of doubtful import, and may, according to the context, mean children or heir, or next of kin. Here I think the words 'of your family' are equivalent to 'of your blood,' that is, 'your posterity,' 'your descendants.'" See also Lambe v. Eames, 10 Eq. 267, 271; and Griffith v. Evans, 5 Beav. 241, where the testator requested that property be not alienated from his "nearest family." In Raynolds v. Hanna, 55 Fed. R. 783, one-half the income of money in trust was to be expended for the benefit of "*his son A. and his family*," the other half for

the benefit "*of the children of my deceased daughter B.*" The testator directed his executors that in the expenditure of the income they should "keep in view the education and maintenance of my grandchildren on a scale comporting with their condition in life." The court held that the surplus should be invested for the benefit of A. and his family and the children of B. By the "family of A." the testator meant his children, but A. should participate. The share for A. and his family should be equally divided, one-half to A. and the other half equally divided among his children. The expression, "if he shall get married and have a family," as a condition precedent to an increase in the amount of an annuity, means to take a wife and to have issue by her. It does not mean marriage alone without children being born. Spencer v. Spencer, 11 Paige (N. Y.), 159, 160.

ily at the time of the execution of the will. Where A. at that time had living two daughters, one of whom had four children, and A. had also grandchildren by two deceased sons, a provision of a remainder given "to the younger branches of his family and their heirs" was held void for uncertainty.¹ But where the provision was that the devise should be subject to such legacies as a son of the testator might bequeath (in case he died without issue) "*to any younger branches of the family*," and the testator had one daughter, who at the date of the will had five children, it was presumed that, by the term "younger branches of the family," he meant those children of the daughter who would *not* inherit in the case of the son's death without issue.²

§ 589. Definition of the word "relations" as statutory next of kin.—In its broadest sense the word "relations" of A. includes persons who are related to A. *in every degree*. But the word "relations" primarily implies consanguinity. It means related by blood; and if some line were not drawn between those nearly and those remotely related, every gift to relations would be void for uncertainty. It is like the term "family," though more vague and uncertain of significance. As it is employed in wills it is construed to mean those persons who would, by virtue of the statute, take the personal property of an intestate as his next of kin.³ It was at one time

¹ Smith v. Fleming, 2 Crompt. Mee. & Ros. 638.

² Doe d. King v. Frost, 3 Bar. & Ald. 546. An exception of property which I may have derived from A. or any of her family includes property derived from A.'s father. James v. Lord Wynford, 2 Sm. & Gif. 350, 352.

³ 4 Kent, Com., p. 339; Sugden on Powers, 514, 515; Ross v. Ross, 25 Can. S. C. R. 307; Hall v. Wiggin (N. H., 1896), 29 Atl. R. 671; Hoey v. Kenny, 25 Barb. (N. Y.) 396; Gallagher v. Crooks, 132 N. Y. (1892), 838, 80 N. E. R. 746; Drew v. Wakefield, 54 Me. (1865), 291, 299; Esty v. Clarke, 101 Mass. 38, 39; Cummings v. Cummings, 146 Mass. 501, 16 N. E. R. 401; Darcy v. Kelly, 153 Mass. 431, 437; Handley v. Wrightson, 60 Md. (1883), 198, 206 (construing "rela-

tives"); Jones v. Roberts, 84 Wis. 465, 471; McNeilledge v. Barclay, 11 Ser. & R. (Pa., 1824), 103; McNeilledge v. Galbraith, 8 S. & R. (Pa.) 43; Huling v. Fenner, 9 R. L. 411; Alexander v. Wallace, 8 Lea (76 Tenn., 1881), 569; Storer v. Wheatley, 1 Pa. St. (1845), 506; Thomas v. Hole, 1 Dickson, 50; 2 Eq. Cas. Ab. 332, 368, pl. 13; Green v. Howard, 1 Bro. C. C. 31, 33; Edge v. Salisbury (1749), Amb. 70; Rayner v. Mowbray (1790), 3 Bro. C. C. 234; Masters v. Hooper (1793), 4 Bro. C. C. 207, 210; Lees v. Massey, 3 De Gex & Jo. 113, 120; Re Caplin's Will, 2 Dr. & Smale, 527, 530; Walter v. Maunde, 19 Ves. 423, 426; Cruwys v. Colman, 9 Ves. 319, 323; Jones v. Colbeck, 8 Ves. 38; Widmore v. Woodruff, Amb. 636; Brunson v. Woolredge, Amb. 507; Brown v. Higgs, 4

regarded as doubtful whether the next of kin or the heir was entitled to come in, in a gift of *real property to relations*. This question is now settled in favor of the distributees under the statute as against the heir.¹ The presumption that the testator, in a gift to his relations, intended to comprise only those who would have taken personal property had he died intestate, is not conclusive, though it is very strong. The court may go outside of the class of relations indicated by reference to the statute, and give to those who are not distributees under it. Thus, where a testator gave property "to be divided among her relations, that is, the Greenwoods, Everetts and the Dows," the Greenwoods, though not within the statutory degrees, were allowed to take jointly with the Dows and the Everetts, who were, as the testator had thus expressly enlarged the meaning of the term.² Where a limitation was to the "*nearest relations*" of my sisters, nephews and nieces, the children of a sister who was alive were permitted to take concurrently with their parent, and with the children of sisters who were deceased.³

§ 590. Relations presumed to mean those by consanguinity — Husband and wife, when included among relations or next of kin.— If there is nothing to indicate that the testator intended to include his relations by affinity, they will not take under a gift to relations *simpliciter*.⁴ This rule is not only applied to a class of *relations generally*, but to a specific class, as "cousins," "nephews," etc.⁵ The testator may, by proper language, include his relations or next of kin by affinity; as by a gift to "my relations *by blood or marriage*;"⁶ "to my nephews

Ves. 718, 719; *Salisbury v. Denton*, 3 Kay & John. 529, 539; *Huskinson v. Bridge*, 4 De Gex & Sm. 245; *In re Holmes*, 62 Law Times, 383; *Fielder v. Ashworth*, L. R. 20 Eq. 410, 412; *Richardson v. Richardson*, 14 Sim. 526.

¹ *Walter v. Maunde*, 19 Ves. 423; *Doe d. Thwaites v. Over*, 1 Taunton, 263.

² *Greenwood v. Greenwood*, 1 Bro. C. C. 32, n.

³ *Rayner v. Mowbray*, 3 Bro. C. C. 234. But the usual rule is to confine

the definition of the term to surviving brothers, sisters, nephews and nieces whose parents are living. *Stamp v. Cooke*, 1 Cox Ch. R. 234, 236; *Marsh v. Marsh*, 1 Bro. C. C. 293; *Smith v. Campbell*, 19 Ves. 404; *Locke v. Locke*, 45 N. J. Eq. 97; *Prall v. Bevan*, 71 Law Times, 5.

⁴ *Maitland v. Adair*, 3 Ves. 231; *Harvey v. Harvey*, 5 Beav. 134; *Blossom v. Sidway*, 5 Redf. (N. Y.) 389; *Craik v. Lamb*, 1 Colly. 489, 494.

⁵ See *post*, § 595.

⁶ *Devisme v. Mellish*, 5 Ves. 529.

and nieces *on both sides*;"¹ and even by a gift to nieces or nephews generally, where he has none by consanguinity at the date of the will, and it is impossible that he shall ever have any, and his wife has one or more.²

Whether the husband or wife of the testator or of another person shall be included among the next of kin or relations of the testator or of that person is a question which has been much discussed. In this connection, assuming, as is generally the case, that relations and next of kin are synonymous, the authorities are equally applicable to both classes of devisees. A provision for the next of kin of A., *without a reference to the statute*, includes neither the husband nor the wife of A.³ So far as the words "next of kin" are concerned, it is well settled that a mere reference to the statute does not enable a husband to take, for he is not a distributee under the statute; and at common law, at least, does not take a share of his wife's personal estate as a distributee, but by paramount right.⁴ The cases are neither harmonious nor reconcilable upon the question, whether a wife can take under a gift to the next of kin *without a reference to the statute*. The majority of the decisions in England and in America, at least where there is no reference to the statute, and many of them, too, where there is an express or implied reference to it, deny to her the right to take under a gift to the next of kin.⁵ The rule of exclusion has

¹ *Frogley v. Phillips*, 8 De Gex, Fisher & Jo. 466, 30 Beav. 168.

² *Sherratt v. Mountford*, L. R. 8 Ch. Rep. 928; *Adney v. Greatrex*, 33 L. J. Ch. 414, 17 W. R. 637.

³ *Brookfield v. Allen*, 6 Allen (Mass.), 585, 587; *Harraden v. Larrabee*, 113 Mass. 430, 432; *Garrick v. Lord Camden*, 14 Ves. 372.

⁴ *Milne v. Gilbert*, 2 De G., M. & G. (Chan.) 715, 722, 2 De Gex, M. & G. 510; *King v. Cleaveland*, 26 Beav. 166, 4 De Gex & Jo. 477.

⁵ *Townsend v. Radcliffe*, 44 Ill. (1867), 446, 450; *Waters v. Tazewell*, 9 Md. (1856), 291, 305; *Harraden v. Larrabee*, 113 Mass. (1873), 430, 431; *Wright v. Trustees M. E. Ch.*, 1 Hoffm. Ch. (N. Y.) 202, 213; *Stewart v. Stew-*

art, 7 Johns. Ch. (N. Y.) 229, 246; *Hamlin v. Osgood* (1862), 1 Redf. 409, 417; *Slosson v. Lynch*, 43 Barb. (N. Y., 1864), 147; *Murdock v. Ward*, 67 N. Y. 387, 8 Hun, 9; *Luce v. Dunham*, 69 N. Y. 36, 41; *Irvin's Appeal*, 106 Pa. St. 176; *Johnson v. Johnstone*, 12 Rich. (S. C., 1863), Eq. 260; *Gittings v. McDermott*, 4 Russ. 384; *Robinson v. Smith*, 26 Sim. 47; *Halloway v. Halloway*, 5 Ves. 399; *Worseley v. Johnson*, 3 Atk. 758; *Garrick v. Lord Camden*, 14 Ves. 372, 386; *Cholmondeley v. Ashburton*, 6 Beav. 86; *Watt v. Watt*, 3 Ves. 244, 247; *In re Jeffery's Trust*, L. R. 14 Eq. 136; *Bailey v. Wright*, 18 Ves. 49; 1 Powell on Devises, 170 (21 Law L.); 2 Roper on Husband and Wife, 63; *Davies v.*

been applied to a future husband, where the testatrix was not a married woman when she devised property to "*her next of kin, according to the statute concerning distribution*," and subsequently married.¹ In England the widow has been both included in,² and excluded³ from, a provision for those persons who would take under the statute of distribution, and in some cases under a bequest to personal representatives. Of course it is within the discretion of the testator so to frame his disposition in favor of the next of kin, or his relations, as to include a wife or husband.

As regards the meaning of the word "*relations*," it will be presumed, in the absence of anything to the contrary, that a devise to relations means those who are such *by consanguinity*, and it will not include either a husband⁴ or a wife.⁵

§ 591. Gifts to relation in the singular — When illegitimate relations are included. — A gift to the "*nearest relation of the testator*" is the same as a gift to his nearest relations, and if several are equally near they will all take equally.⁶ So a gift to "*my nearest relation and the nearest relation of my nearest relation*" goes to a half-sister to the exclusion of the children of a brother.⁷ Usually a gift to relations *simpliciter* does not include those who are illegitimate, *i. e.*, those whose parents or

Bailey, 1 Ves. Sr. 84; Kilner v. Leech, 10 Beav. 362; Lee v. Lee, 29 L. J. Ch. 788. A subsequent husband of the widow of the testator is not included among her next of kin, to whom a contingent gift is made. Jones v. Oliver, 35 N. C. 369.

¹ Keteltas v. Keteltas, 72 N. Y. 312, 315.

² Martin v. Glover, 1 Coll. 269; In re Collins, 36 L. T. (N. S.) 437; Jennings v. Gower, 2 Coll. 537; Starr v. Newberry, 23 Beav. 436.

³ See cases, note 5, p. 786.

⁴ Esty v. Clarke, 101 Mass. 36, 39; Watt v. Watt, 3 Ves. 244; Anderson v. Dawson, 15 Ves. 557; Green v. Howard, 1 Bro. C. C. 31, 33.

⁵ In Storer v. Wheatley's Ex'rs, 1 Barr (1 Pa. St., 1845), 506, it was said: "But a wife is not related to her hus-

band in any respect. Of his connection with her family she is the link or *commune vinculum*, but so far from being connected with him as a relation that her civil existence is melted into his, and they together form one person. A wife, therefore, is no more a relation of her husband than the husband is a relation of himself. It was said *arguendo*, in Garrick v. Lord Camden, that she owes her provision under the statute of distribution, not to the supposition that she is one of her husband's kindred, but to the respect that was felt for her title to the customary share which she had previously enjoyed."

⁶ Marsh v. Marsh, 1 Bro. C. C. 262, 263; Pyot v. Pyot, 1 Ves. 337.

⁷ Marsh v. Marsh, 1 Bro. C. C. 262.

grandparents were not born in lawful wedlock;¹ but the testator may, by suitable language, clearly show that he intends to benefit illegitimate relations, as where he speaks of persons who are illegitimately related to him as "his cousins." In such case the property will go to those who would have been his statutory next of kin if they had been legitimate.²

§ 592. **Provisions made for the poor or needy relations of the testator.**—The construction of a provision for the *poor, needy, necessitous or indigent relations* of the testator, to be carried out by means of powers of appointment and selection in the executor or another person, frequently calls for attention. The addition of such words does not always and alone enlarge the meaning of the term to include those who are not distributees under the statute.³ In several cases, both ancient and modern, in England and America, a provision of money in trust for the aid, relief and assistance, or for the maintenance and support, of the poor and needy relations of the testator, has been regarded by the courts as *in the nature of a public charitable trust* which will be supported, and the court will arrange a scheme by which the objects of the charity may be definitely ascertained, and the intention of the testator will be extended beyond those who are his statutory next of kin at his death. Examples of this rule are, where a fund was to be applied by the executor for the relief of "the most *destitute* of the testator's relations,"⁴ for the aid of "my *poor* relations, if any such there be,"⁵ for the benefit "of the *poorest* relations of the testator and his wife,"⁶ for the purpose of apprenticing out the testator's *poor relations*,⁷ or a provision "for the nearest descendants of A. as they may severally *need*."⁸ And generally any provision for poor relations will be regarded as charitable, and will be distributed among the testator's relations, irrespective

¹ Seale-Hayne v. Jodrell, 61 L. J. Ch. 70, 71; Hibbert v. Hibbert, L. R. 15 Eq. 372.

² In re Deakin, 8 Reports, 702; Seale-Hayne v. Jodrell, 61 L. J. Ch. 70, 71, L. R. 44 Ch. D. 590.

³ Edge v. Salisbury (1749), Amb. 70; Widmore v. Woodroffe, Amb. 636; Carr v. Bedford, 2 Ch. R. 146; Bruns-

den v. Woolredge, Amb. 507; Dickson, 380.

⁴ Gafney v. Kenison, 64 N. H. 354 (1887), 10 Atl. R. 706.

⁵ Darcy v. Kelley, 153 Mass. 431, 26 N. E. R. 1110.

⁶ Isaac v. Defriez, Amb. 595, 596, 17 Ves. 373. note.

⁷ White v. White, 7 Ves. 423.

⁸ Gillam v. Taylor, L. R. 16 Eq. 581.

of the statute, who may be in need of pecuniary assistance, to the exclusion of those who are not in need of that assistance.¹

§ 593. **Powers of distribution among relations.**— A power to appoint among relations may, according to the terms of the will, be limited in its operation and execution to those persons who are statutory next of kin.² This is the rule where the discretion of the donee as to the objects of the power is limited and the power is exclusive. If the donee of the power or the trustee has a discretion, *not only as to the amount which each relation is to take*, but also *a discretion to select such relations as he may think most worthy*, or as he may think *most in need*, he may go beyond the circle of the next of kin indicated by the statute and may appoint among any class of relations he may choose. The word will then be construed in its ordinary sense.³ In default of the exercise of a power to

¹ *Mahon v. Savage*, 1 Sch. & Lef. 111; *Attorney-General v. Price*, 7 Ves. 423. A direction that a sum be set apart for the maintenance of such of the testator's heirs at law as shall be in need of pecuniary assistance is not invalid for uncertainty; nor does it suspend the power of alienation. The beneficiaries are those persons who are necessitous and who may be selected by the executors from among those who would have inherited the land of the testator, had he died intestate; and if there are none such at his death, the fund is to be held for any heirs who may be in need of assistance in the future (*Bronson v. Strouse*, 57 Conn. 147, 17 Atl. R. 699); but in New York state such a provision would be invalid. *Butler v. Green*, 16 N. Y. S. 888, 19 N. Y. S. 890, 65 Hun, 99. The courts are loath to raise a trust in favor of relatives by mere precatory words. Thus, a *hope* that a beneficiary will, in his will, "*do justice*" to the *relations* of the testator (*Hill v. Page*, 36 S. W. R. 735, Tenn.), or a request that he will devise property to certain "*relatives who he thinks may need*

it" (*Durant v. Smith*, 154 Mass. 229, 34 N. E. R. 190), or a devise, the testator knowing that "*if any of her immediate relatives are in need of assistance* by misfortune the devisee will aid them" (*Toms v. Owen*, 52 Fed. R. 417), creates no trust. See § 794, *post*.

² *Pope v. Whitcombe*, 3 Mer. 689; *Meldon v. Devlin*, 53 N. Y. S. 172, 31 App. D. 146; *In re Deakin*, 8 Rep. 702, 709 (1894), 3 Ch. 565, 63 L. J. Ch. 779, 71 J. T. 838, 43 W. R. 70; *Cox v. Wills*, 25 Atl. R. 998, 49 N. J. Eq. 665.

³ *Cruwys v. Colman*, 9 Ves. 319, 324; *Mahon v. Savage*, 1 Sch. & Lef. 111; *Salisbury v. Denton*, 3 Kay & John. 520, 529; *Snow v. Teed*, L. R. 9 Eq. 622; *Caplin's Will*, 34 L. J. (N. S.) Ch. 578; *Longmore v. Broom*, 7 Ves. 124; *Cole v. Wade*, 16 Ves. 27; *Harding v. Glyn*, 1 Atk. 469; *Grant v. Lynam*, 4 Russ. 292, 297. A power to appoint among the friends and relations of A. is confined to the relations of A., the word "friends" being disregarded, as it is synonymous with relations. *Caplin's Will*, 2 Drew. & Smale, 527, 531; *Gower v. Mainwaring*, 2 Ves. 87, 110.

appoint among relations, equity will distribute the fund among those who would take as distributees under the statute, as of the death of the testator, and they will take *per capita*.¹

§ 594. **Distribution among relations as a class is usually per capita.**—It would seem that where reference is made to the statute in order to ascertain the meaning of the word “relations,” the statute would also be employed in order to ascertain the mode and proportion of distribution. But it was very early held that relations would take *per capita*;² and this rule has been adhered to, particularly where the testator has added limiting or enlarging phraseology to the word “relations;” as where, in one case, the testatrix, dying without leaving issue, devised her property to her relations, and “to such only as claim within two months,” and directed that the executors should advertise for them.³ In these cases, where relations are designated as members of a class, only those persons who *answer to the description of relations at the death of the testatrix* are permitted to take,⁴ even where they are not to take until after the expiration of a prior life estate.⁵ If the testator has devised his property to his nearest relations *and A.*, the division will be *per stirpes*; as in the case of a similar provision for the next of kin or children in connection with a stranger.⁶ Though the addition of the word “near” to relations will not exclude any who would take by representation under the statute, the effect of a devise to “nearest relations”

¹ Attorney-General v. Dooley, 2 Eq. Ca. Ab. 194; Darcy v. Kelley, 153 Mass. 431, 437, 26 N. E. R. 1110; Meldon v. Devlin, 53 N. Y. S. 172, 31 App. Div. 146, also holding that the next of kin take a vested right to and interest in the property, subject to diminution or defeat by the appointment under the power.

² Thomas v. Hole, 1 Dickens, 50; Green v. Howard, 1 Bro. C. C. 31.

³ Tiffin v. Longman, 15 Beav. 275, 276. So, also, where a testatrix directed that the property should pass to her relations “in America.” Eagles v. Le Breton, 42 L. J. Ch. 362, L. R. 15 Eq. 148.

⁴ See also Rayner v. Mowbray, 3 Bro. C. C. 234; Masters v. Hooper, 4 Bro. C. C. 207. A gift to relations, who are to claim within a year, is undoubtedly valid. Honeywood’s Will, Amb. 708.

⁵ In re Nash, 71 Law T. (N. S.) 15; Prall v. Bevan, id. That nearest relations may include a sister-in-law, see Hall v. Wiggin (N. H.), 29 Atl. R. 671.

⁶ Young’s Appeal, 83 Pa. St. (1896), 59; McNeilledge v. Galbraith, 8 Serg. & R. (Pa.) 43; McNeilledge v. Barclay, 11 Serg. & R. (Pa.) 103.

of A. is that the surviving brothers and sisters of A. will take to the exclusion of the children of those deceased who would take by representation in place of their parent.¹

¹ *Locke v. Locke*, 45 N. J. Eq. 97, C. C. 293; *Davenport v. Hassell*, Bush. 98; *Cox v. Wills*, 49 N. J. Eq. 130, Eq. 29; *Ennis v. Pentz*, 3 Bradf. Sur. 135; *Hall v. Wiggin* (N. H.), 29 Atl. (N. Y.) 382. R. 573, 671; *Marsh v. Marsh*, 1 Bro.

CHAPTER XXIX.

GIFTS TO NEPHEWS AND NIECES, BROTHERS AND SISTERS, DAUGHTERS, COUSINS, HUSBAND OR WIFE, TO SERVANTS, AND TO PERSONS OF THE TESTATOR'S NAME, AS PURCHASERS.

§ 595. "Nephews" and "nieces" mean primarily those by consanguinity.

596. When a provision for nephews and nieces will include great-nephews and great-nieces.

597. Presumption that legitimate nephews and nieces are meant.

598. Children of a nephew or niece may take parent's share.

599. Gifts to brothers and sisters.

600. Gifts to daughter or daugh-

ters — Number incorrectly stated.

§ 601. Gifts to husband or wife — When claimed by a person who is not a lawful husband or wife.

602. From what time a will speaks as respects a devise to the husband or wife.

603. Gifts to cousins — When class is ascertained.

604. Gifts to servants.

605. Gifts to persons of a particular name.

§ 595. "Nephews" and "nieces" mean primarily those by consanguinity.— The words "nephews" and "nieces," when used in a will, in a provision for the nephews and the nieces of the testator himself, in the absence of a controlling context, have the primary meaning of his *own nephews and nieces*, *i. e.*, the children of his brothers and sisters,¹ including the children of his brothers and sisters of the half blood. For when a man speaks of his brothers and sisters, he means those persons who form a class and who stand in the same relationship either to one or to both of his parents that he does himself.² But it is possible that the testator may have intended to refer to his nephews and nieces by marriage — that is to say, he may have

¹ Green's Appeal, 42 Pa. St. 25, 30; Wells v. Wells, L. R. 18 Eq. 504. See also 9 L. R. A. 200; *post*, § 596. A niece by affinity or a great-niece is not permitted to take a share in a residuary gift "to nephews and nieces of every description mentioned in the will," though a niece by mar-

riage has been mentioned in the will as a niece *simpliciter*. Lewis v. Fisher, 2 Yeates (Pa., 1797), 196. The propriety of the decision may well be doubted.

² Lewis v. Fisher, 2 Yeates (Pa.), 199; Shelley v. Bryer, Jac. 207; Grieves v. Rawley, 10 Hare, 63, 65, 66.

meant his wife's nephews and nieces,—and to include them in a devise to nephews and nieces as classes, and generally parol evidence is admissible to show that he did refer to such persons.¹ Thus, where the testator and his wife *each* had a nephew by the name of Joseph Grant, who was living at the date of the will, parol evidence, consisting of the declarations of the testator, and also of evidence to prove his treatment of his wife's nephew as his own nephew, was received to show that the testator intended that person to take under a devise to "*my nephew*," Joseph Grant.² If at the date of the execution of the will the testator has no nephew or niece of his own living, and, either because he has no brothers or sisters then living, or because those who are living are not likely to have children subsequently born to them, it is apparent that he cannot mean his own niece or nephew, a niece or nephew of his wife may with propriety be included under a devise to "my nephews or nieces." But it must appear that he was cognizant of the state of facts as above detailed.³ The same rule would apply where he has only *one* niece by *consanguinity*, and *a fortiori* if there be no possibility of more, and where he has in the will given all his nephews and nieces, in the plural, legacies as such.⁴ Where a testator gave property to A. and A.'s wife, calling them his nephew and his niece, and A. was his wife's nephew, and the testator also gave legacies to his *own* nephews and nieces, and furthermore ordered his residuary estate to be divided among his nephews and his nieces, by name including the nephew and the niece to whom "I have given legacies aforesaid," some of whom were also nephews and nieces of the testator's wife, it was held that the wife's nieces took under the residuary bequest, and that A. and his wife each took an equal share in the residue as a nephew and a niece, though in

¹ Green's Appeal, 42 Pa. St. 25, 30; R. 5 C. P. 380, 727. *Contra*, In re Merrill v. Morton, 43 Law Times, 750; Root (Pa. St., 1897), 40 Atl. R. 818.

Sherburne v. Sischo, 143 Mass. 439, 9 N. E. R. 797; Hogg v. Cook, 32 Beav. 641; Grant v. Grant, L. R. 2 P. & D. 8, 18 W. R. 230. In a very recent case such evidence was rejected. In re Root's Estate (Pa. St.), 40 Atl. R. 818.

³ Sherratt v. Mountford, L. R. 15 Eq. 305, L. R. 8 Ch. 928; Hogg v. Clark, 32 Beav. 641.

⁴ Adney v. Greatrex, 38 L. J. Ch. 414, 17 Week. R. 637. A bequest to nephews and nieces does not include the wives or widows of the nephews. Goddard v. Amory, 147 Mass. 71 (1888), 16 N. E. R. 725.

fact neither of them was related to the testator by blood.¹ But the mere fact that the testator in his will refers to the nephew or the niece of his wife *as his own nephew or niece* is not always conclusive that he intends him or her to take under a provision for his own nephews and nieces, made in another part of his will.²

§ 596. When a provision for nephews and nieces will include great-nephews and great-nieces.—Whether a provision for nephews and nieces shall include great-nephews and great-nieces has been much discussed in the cases. The answer to this question always depends upon the intention of the testator. In the absence of anything in the will to show a contrary intention, it is to be conclusively presumed that a gift to the nephews and nieces of the testator *simpliciter* is not intended to include his great-nephews and great-nieces, *i. e.*, the children of any nephew or niece of the testator who may have died before him.³ A power to appoint *among nieces* cannot be exercised in favor of great-nieces, *i. e.*, children of nieces.⁴ The presumption is that the testator means those persons who are members of the class at his death, though the context may show that the testator meant that the child of a deceased niece or deceased nephew shall take as a niece or a nephew.⁵ Thus

¹ *In re Gue*, 61 L. J. Ch. 510, 40 W. R. 553.

² *Smith v. Lidiard*, 3 K. & J. 252. See also *Wells v. Wells*, L. R. 18 Eq. 504, where the provision was for "all my nephews and nieces," and the court held that a niece by marriage could not take, though elsewhere in the will the testator had given her a legacy by name, calling her "my niece."

³ *Denny v. Kettell*, 135 Mass. 138; *Lewis v. Fisher*, 2 Yeates (Pa., 1797), 196; *Van Gieson v. Howard*, 7 N. J. Eq. 462; *Buzby v. Roberts*, 53 N. J. Eq. 566 (1895), 32 Atl. R. 9; *In re Hunt's Estate*, 6 N. Y. Supp. 186, 117 N. Y. 529 (1890), 23 N. E. R. 120; *Marsh v. Hague*, 1 Edw. (N. Y.) 174, 181; *Groves v. Musther*, 43 Ch. Div. 569, 59 L. J. Ch. 296; *Hussey v. Berkeley*, 2 Eden, 194; *Thompson v. Robinson*,

27 Beav. 486; *Brown v. Brown*, 37 W. R. 472, 58 L. J. Ch. 420.

⁴ *Falkner v. Butler*, Amb. 514; *Shelley v. Bryer*, Jacob, 207.

⁵ *Cromer v. Pinckney*, 3 Barb. Ch. 466; *Brower v. Bowers*, 1 Abb. N. Y. Ct. App. 214. *Testatrix* directed her residuary estate to be equally divided between her nephews and nieces, not before named, "but, should any of them be dead before me, I then direct that his or her share shall be equally divided between his or her children." The children of nephews and nieces dead at the date of the will were not entitled to take under the bequest. *In re Musther*, 43 Ch. Div. 569. A will which stated as follows: "I have a number of nephews and nieces living, whose names and residences I am unable to state accurately." The testator then gave each

where the testator, after dividing his property among his nephews and nieces as classes, gave a legacy to a great-nephew by his name, calling him his nephew, which was, as he declared, to be in addition to his nephew's share of the residue, the court held that not only this great-nephew, but that all the great-nephews and great-nieces of the testator alive at his death, should be entitled to a share in the residue given to nephews and nieces.¹ Where a testator, *knowing that he had no nieces* at the date of the will, gives property to his nieces, parol evidence is received to show that he meant great-nieces.² The issue of the nephews and nieces who have died *before the testator* will take under a provision for the nephews and nieces, to them and to their heirs, where a statute provides against lapse in case of the death of a relative of the testator leaving issue, and also provides that such issue shall take.³ Where the testator has described his great-niece as "*his niece A., the daughter of his nephew B.*," and he then divides the residue among his nephews and nieces, the court held that, by his definition of the word "niece," he meant that all his great-nieces and his great-nephews should take under the residuary clause as nieces and nephews.⁴ On the other hand, a provision which is designed for the benefit of *great-nephews and great-nieces does not include nephews and nieces*, though the testator has expressly stated that the gift was made so that each child of a deceased brother or deceased sister of the testator should receive a benefit under it.⁵ So a bequest to the "spinster or *unmarried* nieces

nephew and niece a legacy, providing that if any should die before him their children were to receive the parent's share. The executors were directed to communicate with "said nephews and nieces." The court held that the children of nephews and nieces who were dead *when the will was executed* were not entitled. In *re Morrison's Estate*, 139 Pa. St. (1890), 306, 20 Atl. R. 1057; *Id.*, 27 W. N. C. 163; *ante*, § 594.

¹ *Weeds v. Bristow*, L. R. 2 Eq. 333; *Shephard v. Shephard*, 57 Conn. 24, 17 Atl. R. 173; In *re Hunt's Estate*, 131 N. Y. 456, 30 N. E. R. 485.

² In *re Davis* (R. L., 1897), 35 Atl. R.

1046. *Contra*, In *re Fish*, 7 Reports, 434 (1894), 3 Ch. 83. Cf. *Stringer v. Gardner*, 27 Beav. 35, 39, 4 De Gex & J. 468, where parol evidence was refused to show that an illegitimate grand-niece of the wife of the testator was meant.

³ *Lee v. Gay*, 155 Mass. 423, 29 N. E. R. 632.

⁴ *James v. Smith*, 14 Sim. 214.

⁵ *Kimball v. Chapple*, 18 N. Y. Supp. 30, 27 Abb. N. C. 437. A bequest to my "aforesaid nieces and nephews" means all the nephews and nieces of the testator where none had been before mentioned in the will. *Campbell v. Bouskell*, 27 Beav. 325, 329.

of the testator" includes those who were widows at the death of the testator as well as those who had never been married.¹

§ 597. **The presumption that legitimate nephews and nieces are meant.**—It will be presumed, until the contrary is shown, that the testator, in mentioning nephews and nieces of himself or of another person, had in mind legitimate nephews and nieces only.² The illegitimate children of his brothers or sisters do not take under a devise to his nephews and nieces as a class, though, by a statute, such children would, by reason of the marriage of their parents, be enabled to inherit from their father and from his collateral kindred.³ It may, however, be shown by parol, as evidence that the testator meant to benefit illegitimate nephews and nieces, that he was in the habit of describing the illegitimate children of his brother as his nephews and nieces.⁴

§ 598. **Children of a nephew or niece may take the parent's share.**—If the testator, in providing for his nephews and nieces, directs that in case of the death of any one or more of them the issue of those deceased shall receive their parent's share by substitution, the issue of nephews and nieces who *died before the will was made*⁵ will take the shares which their parents would have received.⁶ Where a testator, giving legacies to his nephews and nieces, and expressly to A. and B., the children of a deceased niece, by name, adds that, in case any of his nephews or nieces shall die, the issue of those deceased will take their share, A. and B. are to take *per stirpes* and not *per capita*.⁷ Generally, where it appears to be the intention of the testator to give legacies to nephews and nieces as to classes, they will take *per capita* and not *per stirpes*. The

¹ In re Conway's Estate (Pa. St.), 87 Atl. R. 204; 5 Pa. Dist. R. 332.

² *Ante*, §§ 570, 591.

³ Lyon v. Lyon, 88 Me. (1896), 395, 400, 34 Atl. R. 180 (construing Pub. Law, 1887. ch. 14). See also Bolton v. Bolton, 73 Me. 299, 309; Kent v. Barker, 2 Gray (Mass., 1854), 535, 536; Brown v. Brown, 37 W. R. 472, 58 L. J. Ch. 420.

⁴ In re Ashton (1892), 1 Ch. 83, 87. An immediate devise to "my nephews and nieces, the children of my broth-

ers A., B. and C.," refers to those who are nephews at the death of the testator. It does not include a child born to A. after the death of the testator, though A. had never had children born to him prior to that time. Worcester v. Worcester, 101 Mass. 128, 133.

⁵ § 595.

⁶ Hayward v. Barker, 21 N. E. R. 142, 113 N. Y. 368. Cf. § 342.

⁷ Geery v. Skelding, 27 Atl. R. 77, 62 Conn. 499.

mere fact that the parents of the nephews and nieces are named is not sufficient to divide them into families or subclasses, nor does the naming of the several parents indicate an intention that the nephews and nieces are to take in distinct classes *per stirpes*.¹

The statutes which have been passed in many states, designed to prevent a lapse in the case of the death of a legatee before the testator, are usually applicable to gifts to classes. But the decisions are not harmonious. In the state of Maine the courts have held that, under a bequest to nieces as a class in equal shares, the children of those nieces who had died in the lifetime of the testator, but after the execution of the will, took the parent's share, where a statute expressly provided that there should be no lapse in the case of the death of any legatee before the testator leaving descendants or relatives.² An exactly contrary decision has been rendered by the courts of the state of New Hampshire in the case of a class gift to nephews and nieces.³ A direction to divide "*equally among nephews and nieces, and the children of said nephews and nieces who may then be living, so that each of the said nephews, nieces, grand-nephews and grand-nieces shall receive an equal share,*" means by the term "*who shall then be living,*" living at the death of the life tenant. A grand-niece or a grand-nephew whose parent had died before the death of the life tenant would not take, any more than a grand-nephew or a grand-niece who survived him; a statute providing for the taking by children of the parent's interest to prevent lapse having no application, it being evident that the testator intended his nephews and nieces and their children to take as one class.⁴ An express provision that, in case of the death of a nephew or niece to whom legacies are given in the life-time of a testator without issue, his or her share shall go to all nephews and nieces, means all nephews and nieces who survive the testator, and not merely those of the particular subdivision or family in which the deceased was included.⁵ It has also been held that, in the case

¹ *Merriam v. Simonds*, 121 Mass. 198; *Campbell v. Clark*, 64 N. H. 328, 10 Atl. R. 702.

³ *Campbell v. Clark*, 64 N. H. 328, 10 Atl. R. 702. See *ante*, § 338.

² *Moses v. Allen*, 17 Atl. R. 66, 81 Me. 263.

⁴ *Bigelow v. Clapp* (Mass., 1896), 43 N. E. R. 1037.

⁵ *In re Fahnestock's Estate* (Pa.,

of a devise in equal shares to the nieces of the testatrix and to the nieces of her husband, a person who is rightfully in both classes of nieces cannot claim a share as a member of each class.¹

§ 599. Gifts to brothers and sisters.—Where the testator employs the word *brother* or *sister* in his will, he will be presumed *prima facie* to mean his brother or sister of the whole blood. But this presumption is not conclusive, and may be rebutted by inference from the context showing that he meant a half-brother or a half-sister.² The rules of construction which are applicable to gifts to children, heirs and next of kin as purchasers are applicable to devises to brothers, cousins, etc. Thus, a gift to A. for life, remainder to his brothers, will vest in the brothers of A. who are living at the death of the testator, subject to open and let in other brothers who are born during the life of A.³ It has been held, in construing a residuary clause by which property is divided *among the brothers and the sisters of the testator*, that he means primarily those who are alive at his death. Though under a statute abolishing the common-law rule of lapse, the issue of a brother or sister who died during the life-time of the testator and *after* the execution of the will may take their parent's share, it is the rule that the issue of brothers and sisters of the testator who were deceased *at the date of the execution of the will* cannot take by representation with brothers and sisters who were alive at that date.⁴ This was so held where the devise was to "brothers and sisters for life, and remainder to their children."⁵ So, also, the children, or other issue of a deceased brother, cannot be permitted to take their parent's share where the testamentary provision is expressly for the brothers of the testator, or of A., who may be surviving at the death of a tenant for life.⁶

1896), 23 Atl. R. 573; 10 Pa. Co. Ct. R. 199, affirmed.

¹ Campbell v. Clark, 64 N. H. 328, 10 Atl. R. 702.

² Wood v. Mitchell, 92 N. Y. 379, 61 How. Pr. (N. Y.) 48; Leake v. Robinson, 2 Mer. 363. Compare Luce v. Harris, 79 Pa. St. 432.

³ Devisme v. Mello, 1 B. C. C. 537; Doe d. Steart v. Sheffield, 13 East, 526.

⁴ John's Estate, 11 Phila. 144; Fuller v. Martin, 96 Ky. 500, 29 S. W. R. 315.

⁵ Walsh v. Blayney, L. R. 21 Ir. 140; Gowling v. Thompson, L. R. 11 Eq. 366; Barneby v. Van Tassell, L. R. 11 Eq. 363. *Contra*, Wingfield v. Wingfield, L. R. 9 Ch. Div. 658, 666.

⁶ Mullarkey v. Sullivan, 136 N. Y. 227, 32 N. E. R. 762. But in Huntress v. Place, 137 Mass. 409, a devise to

It is to be presumed, in the absence of indications to the contrary, that the testator, in mentioning brothers and sisters, means those who are legitimately brothers and sisters. But the fact that a person claiming as a brother of the testator is the illegitimate son of the mother of the testator, *if the fact of illegitimacy was unknown to the testator*, does not disqualify him from taking a devise to the brother of the testator, if it is otherwise apparent that the testator intended him to do so.¹ In conclusion it may be remarked that a statute providing that if a relative of the testator² to whom a devise or legacy is given shall die before the testator, leaving issue, the issue shall take the estate of the ancestor, applies to a testamentary provision for the brothers and sisters of the testator, and to the brothers and sisters of the wife of the testator.³

§ 600. Gifts to daughter or daughters — Numbers incorrectly stated by the testator.— The word “daughter” signifies *prima facie* a legitimate female descendant in the first degree from the *propositus*, unless it clearly appears from the context and from the family relations of the testator that he meant an illegitimate child. Hence, where a testator has no legitimate daughters, but his wife had three illegitimate daughters who were born before his marriage to her, and who were subsequently acknowledged by him as his own daughters, it was held that they were entitled under a bequest to “my daughters.”⁴ So, too, where a testator specifically bequeaths property to each of his illegitimate children, designating them as “my son” and “my daughter,” and their mother as “my wife,” they will also take under a residuary clause directing the residue of the estate to be divided between “my children.”⁵ A gift to the sons and the daughters of the testator as such may, in case the common-law rule of lapse has been abolished by statute, include the descendants of such as are dead at the making of the

“my brothers and their heirs” was construed to include the heirs of brothers who were deceased at the date of the execution of the will.

¹ *Dane v. Walker*, 109 Mass. 179, 180.

² *Ante*, §§ 337, 338.

³ *Strong v. Smith*, 84 Mich. 567, 48 N. W. R. 183. Compare *Coffin's Es-*

tate, 36 W. N. C. 71, 4 Pa. Dist. Ct. R. 93.

⁴ *In re Herbert*, 29 L. J. Ch. 870, 1 Jo. & H. 123; *Dorin v. Dorin*, 7 H. L. Cases, 568, 573, 575; *Laker v. Hordern*, L. R. 1 Ch. Div. 644.

⁵ *Dickison v. Dickison*, 36 Ill. App. 503.

will.¹ And it will certainly include the descendants of daughters who died in the life-time of the testator and after the execution of the will,² though this is not the general rule independently of statute, unless it appears to be the intention of the testator.

So, also, where the will devised a life estate to the sister of the testator, and at her death the remainder to her daughters who may be unmarried, but, if there were no unmarried daughters at her death, then to be equally divided among *all the daughters* of the life tenant, and there were three married daughters but no unmarried daughters at the death of the life tenant, the court held that the remainder was to be divided equally among the three, to the exclusion of the heirs of a married daughter who had died before her mother.³ It would require a very strong context to include the surviving husband of a deceased daughter, under a provision for the sons and daughters of the testator for their respective lives, and on their death to their children, and if any of the testator's children shall die, leaving a widow, then to her during widowhood. The presumption is against it; for the intention of the testator is not so much to provide for those who have married his children as for his own sons and daughters and their issue.⁴ The general rules of construction which are applicable to testamentary provisions for children are also applied to devises to sons and daughters. A bequest to "my daughters," or to the "daughters of A.," includes daughters by several marriages. And while a gift to the daughters of the widow of the testator, following a life estate given her, would doubtless include her daughters by a husband whom she may marry after the death of the testator, a gift to "our daughters," under such circumstances, would take in only the daughters born to her of her marriage with the testator.

A mistake in a devise to the daughters of a person, by which the number of the daughters is understated, will be corrected by the court where it is apparent from the will that the testa-

¹ Jamison v. Hay, 46 Mo. 546; Smith's Will, 2 Des. (S. C.) 123.

² Bancroft v. Fitch, 164 Mass. 401, 402.

³ Robertson v. Garrett, 72 Tex. 372,

10 S. W. P. 96. Compare Shaw v. Eckley, 169 Mass. 119, 47 N. E. R. 609.

⁴ Wellington v. Drummer (N. H., 1898), 40 Atl. R. 392.

tor intended to benefit all the daughters. Thus, where a gift was to A.'s daughters, if *both or either of them should survive B.*,¹ or where an executor was directed to divide a fund between the two daughters of A., and if *either should die, then to the survivor, and if both should die, then over*,² and it happened in each case that there were three daughters, the property or fund was divided equally among them. And where the testator gave £50 each to the "two sons and daughters of A.," who had in fact one son and five daughters at the date of the will, the court decreed that £50 should be paid to each of A.'s children.³

§ 601. Gifts to a husband or wife when claimed by person not a lawful husband or wife.—The word "husband" or "wife," when it is employed in a will to describe the object of a bequest, is presumed to mean a lawful husband or wife. This presumption is never conclusive and may be rebutted by slight evidence of an intention to the contrary. These words are usually employed by the testator to designate some particular person who is either his or her wife or husband, or who is the wife or husband of another person. We will first consider the case where the word is used to designate the husband or the wife of the testator. Where a testator's marital relations are illegitimate, either he is aware of this fact or he is not. If he is cognizant of the fact that the person whom he describes as his wife is not lawfully such, and the devise is claimed by a woman who has no lawful right to the appellation, it is for the court to ascertain from all the circumstances if the testator meant, by using the word "wife," to designate a person who was not a wife in law. In such case the testator, *though he knew the illegitimacy of his marital relations*, has a right to demand that his intentions shall be carried out, and the court will not declare the legacy invalid. The right of the legatee will not be affected because of the immorality of her relations with the testator.⁴

¹Scott v. Fenoulhout, 1 Cox Ch. Mass. 85, 87, 44 N. E. R. 346. In this case the testator, having deserted his

²Stebbing v. Walkey, 1 Cox Ch. R. lawful wife, married M. and lived with her thirty-five years, holding

³Harrison v. Harrison, 1 Russ. & her out to the world as his wife. In his will he referred to a daughter of

⁴In Goods of Howe, 83 W. R. 48, M., by a former husband, as "my step-daughter," and gave "provision

A devise to a woman who is described as the wife of the testator may be void if she had a previous husband living, and this fact was known *to her*, though *not* to the testator, she having deceived him in that respect, where the property is given to her because she is his wife.¹ But where a testator gave property to "*his wife*," who was not legally a wife, as when she married the testator she had a husband living, whose whereabouts were unknown to her and from whom she had not heard in nineteen years, it was held that, having acted in perfect good faith in contracting the marriage, having reasonable grounds for supposing that her husband was dead, she was entitled to receive the legacy as though she were the lawful wife of the testator.² So also a provision that a bequest to "*my said wife A.*" shall not be considered to be in lieu of dower," but that she shall be entitled under the law as "*my widow*," gives A., though she was not in fact the testator's lawful wife and hence cannot be his widow, the same interest in his real estate as she would have had if she were.³ These rules and principles do not apply where a person claiming a devise to the *husband or wife of the testator or testatrix* has *deliberately deceived him or her* as to his or her right to enter into a marriage; for, where a legacy is given to a person because he is presumed to possess a particular character which he has falsely assumed, and this particular character is the sole motive of the testator's bounty, the legacy

and consumable stores," and the residue in trust for the benefit of "my wife" for her life, with remainder to two persons named who were the children of his lawful wife, describing them "as my only children by my first wife." *Held*, that by "my wife" the testator meant M., though the will stated that the provisions for her are made in lieu of "her lawful rights." *Hardy v. Smith*, 136 Mass. 328, 331. In the last case the testatrix, having a husband living at the date of the will, left a will describing herself as "the wife of P.," who was not her husband, but with whom she had been unlawfully cohabiting. She also devised property to "*my husband*," which P. was permitted to receive as her "husband."

See also *Pratt v. Mathew*, 22 Beav. 334, 338, 340. The evidence which is produced to show that a testator intended to provide for a woman with whom A. had maintained illicit relations, and by whom he had children (A. having a wife living at the date of the will), under a gift "to the wife and children of A.," must be clear, convincing and cogent. *Miller v. Miller*, 30 N. Y. Supp. 116, 79 Hun. 197; *Giles v. Giles*, 1 Kee, 685, 692. And *cf.* *Lepine v. Bean*, L. R. 10 Eq. 160.

¹ *Wilkinson v. Joughin*, L. R. 2 Eq. 319, 322.

² *In re Petts* (1859), 27 Beav. 576, 578.

³ *Dicke v. Wagner*, 95 Wis. 260, 70 N. W. R. 159.

is void, as the law will not permit a fraud to be perpetrated. Accordingly, where a married woman executed a power of appointment in favor of a man who was by her supposed to be her husband, but who was not lawfully such, she having been deceived by his statement that he was an unmarried man, made at the time of the marriage to him, though he had another wife living, the execution of the power was declared void.¹ Again, where a man devised money to a woman to whom at the date of the will he was engaged to be married, designating her as "my wife," and died before the marriage was consummated, she was entitled to receive her legacy, where it conclusively appeared that the gift was not upon a condition that she should marry him.²

§ 602. From what date the will speaks as respects a devise to a husband or wife.—Under the rule that where a testator refers to an existing state of things, or speaks of an existing relationship between persons, the will speaks as of its date and not as of his death,³ a devise to A., and "at or after his death to *his wife*,"⁴ or "to the *widow of my son A.*," the son being *then* alive,⁵ is presumed to refer to the woman who is the wife of A. at the date of the execution of the will.⁶ This is always the rule in the construction of a gift to the wife of A., where that person has a wife who is alive at the date of the execution of the will, though at the death of the testator the husband is dead and she has become the wife of another during the life of the testator. If the person to whose wife a de-

¹ Kennell v. Abbott, 4 Ves. 802, 804, 809.

² Schloss v. Stiebel, 6 Sim. 1, 5. See also Rishton v. Cobb, 5 Myl. & Cr. 145; Doe d. Gaius v. Rouse, 5 Com. Bench, 422.

³ Ante, § 15.

⁴ Van Syckel v. Van Syckel, 51 N. J. Eq. 194, 26 Atl. R. 156; Anschutz v. Miller, 81 Pa. St. 212.

⁵ Beers v. Narramore, 61 Conn. 13, 23 Atl. R. 1061.

⁶ Where the testator gave land to his married daughters, and in a subsequent clause provided that if either of the daughters (naming them) should die "leaving a husband sur-

viving her," he should receive a life income, the testator meant only those persons who at the date of the execution of the will were the husbands of his daughters. Johnson v. Webber, 33 Atl. R. 506, 65 Conn. 501. The phrase, "leaving a husband surviving," refers to the husband who is living at the date of the will. Humphrey v. Winship, 28 Hun (N. Y.), 33. And cf. 10 Mod. 371; 8 Vin. Ab. 309, tit. Dev., pl. 2; Plowden, 344, A.; Nablock v. Garrett, 1 Russ. & My. 629, 630 (a devise "to *my wife*"); Bryan's Trusts, 2 Sim. (N. S.) 103; Franks v. Booker, 27 Beav. 635.

visé is given has no wife at the date of the execution of the will, the legacy will go to her who may be his wife at the death of the testator, in the absence of a clearly expressed intention to the contrary. If the person whose wife is referred to has no wife either at the date of the will or at the death of the testator, a devise to his wife may go to that woman who shall, after the death of the testator, become his wife. A devise "to my son and his wife," and, on the death of the "widow of my son," then over, means the son's wife at the date of the execution of the will, though they were divorced in the life-time of the testator and the son married another.¹ But where the will directs that, if A.'s wife shall survive him, she shall be paid an annuity *during her widowhood*, and A. and his wife are divorced, the annuity to the wife fails; for, as the *latter can never be A.'s widow*, she cannot take the annuity.² For the same reason a provision for A., if she shall become a widow, is void where A. at the testator's death is not a lawful wife, which, it may be assumed, she must then be in order to fulfill the condition mentioned.³ The same rule is applied to a gift of an annuity during widowhood to the wife of the testator, when his marriage was annulled, after execution, upon the grounds of the impotency of the testator.⁴ But it seems that a life interest given to "*any husband with whom A. might intermarry, if he should survive A.*," may be claimed by one who was her husband at the date of execution, though he was divorced from A. before the death of the testator.⁵ A legacy given absolutely to a woman whom the testator describes as the widow of A. is not void merely because the woman, though she is a widow at the date of the execution of the will, subsequently

¹ *Davis v. Kerr*, 38 N. Y. S. 387, 3 App. Div. 322.

² *Peppin v. Bickford*, 8 Ves. 570; *Radford v. Willis*, L. R. 7 Ch. 7; *Frank v. Frank*, 3 Maule & Sel. 25, 8 Taunton, 468; *In re Lyne's Trusts*, L. R. 8 Eq. 65; *Longworth v. Bellamy*, 40 L. J. Ch. 513.

³ *In re Lowe*, 61 L. J. Ch. 415, 416.

⁴ *In re Boddington*, L. R. 22 Ch. D. 597, 52 L. J. Ch. 289, 48 L. T. 110, 31 W. R. 449, W. N. 1884, 12.

⁵ *In re Bullmore*, 52 L. J. Ch. D. 456;

Bullmore v. Wynter, id. Disapproved in *Hitchins v. Morrieson*, L. R. 40 Ch. D. 30. A woman who has procured a divorce from her husband is "sole and unmarried" in the sense of these words as they are used in a direction to pay "to A. if she be then sole and unmarried." *Lessingham's Trusts*, L. R. 24 Ch. D. 703, 49 L. T. 235, 32 W. R. 116. See §§ 506-508 for cases illustrating estates during widowhood.

marries, and at the death of the testator she is the wife or even the widow of B. The incorrect portion of the description will be rejected if she can be identified from what remains. But a legacy to the widow of A., "so long as she shall remain a widow," or his widow, is forfeited if she marries in the lifetime of the testator, and if she is the wife of B. at the death of the testator.

§ 603. Gifts to cousins — When class is ascertained.— A gift to the cousins of the testator, in the absence of a controlling context, includes only his first cousins, *i. e.*, the children of his uncle or his aunt;¹ and a gift to *first cousins expressly* means those who are such at the date of the will,² excluding the issue of any first cousins who were dead at that time, whether the testator knew of their death or not.³ It has been held that first cousins once removed may share in a provision for the second cousins of the testator if there are no second cousins at the date of the will.⁴ The testator may, by the peculiarity of his language, put a particular definition on the word "cousins." So, where he gave property to "my cousins living at *my* death, and the children of my cousins *then* dead," but expressly excluded from taking under his will the only persons who were or could, in the ordinary course of events, have been his cousins, the children of those excluded persons could not take under the provision for children of deceased cousins.⁵ So, too, a gift to the first and second cousins of the testator as classes will comprise all persons who are within the sixth degree of relationship to him, as are second cousins, and the gift will comprehend great-nieces and first cousins once and twice removed.⁶

¹ Stephenson v. Abingdon, 31 Beav. 305; Caldecott v. Harrison, 9 Simons, 457. See also *In re Taylor*, L. R. 34 Ch. D. 255, 56 L. J. Ch. 173.

² Howland v. Slade, 155 Mass. 415, 416.

³ White v. Mass. Institution, 50 N. E. R. 512 (Mass., 1897); Sanderson v. Bayley, 4 My. & Cr. 56; Stoddart v. Nelson, 6 D. M. & G. 68. A statute providing against lapse in the case of a legacy to relatives of the testator does not vary this rule, and those only take who were first cousins

at the date of the will with the issue of first cousins dying *between* the execution of the will and the death of the testator. Howland v. Slade, 155 Mass. 415, 416, 29 N. E. R. 631.

⁴ Slade v. Fooks, 9 Sim. 386. *Contra*, Corporation of Bridgenorth v. Collins, 15 Sim. 541.

⁵ Stephenson v. Abingdon, 31 Beav. 305.

⁶ Mayott v. Mayott, 2 Bro. C. C. 125; Silcox v. Bell, 1 Sim. & St. 301; Charge v. Goodyer, 3 Russ. 140.

§ 604. Gifts to servants.— A gift by the testator to his servants who are living with him at his death goes only to his servants who are regularly, permanently and continuously employed by him.¹ A woman whom the testator employed from time to time to do washing and house-cleaning in his family, and to assist the regular servants employed by him, and who also took charge of the country residence of the testator while he was absent, is not a servant, nor is she capable of taking under a bequest to such “*servants as shall be in my employ*” at my death.² A devise to “household servants” means only domestic servants who are living in the house with the master. It does not include gardeners, coachmen or grooms who sleep outside of the house.³ Generally, whether a devise to “servants in *my service*” shall include outdoor servants depends altogether on the circumstances of the testator⁴ at the date of the will or at his death. Thus, under a devise to servants “*living with the testator at his death*,” a farm bailiff who then lived, rent free, on the farm, and who was paid a yearly salary, was included, for the court would not construe “*living with the testator*” as an actual living in his house.⁵ But on the other hand, a steward who, though employed by the testator, was at liberty to serve another master also, will not take a bequest to *servants* who are “*living with the testator*,”⁶ though he may take under a gift to “*all servants in my service*.”⁷ Where a provision is expressly for servants *in the testator’s service* or employ, it will be presumed that he intends such only as are in his service *at his death*, in the absence of anything to the contrary.⁸ And where the provision is expressly for servants who are in the testator’s service at his death, the mode of dismissal during his life-time seems to be immaterial.⁹ Under such a provision a

¹ Chilcot v. Bromley, 12 Ves. 114. If a servant is in his service at his death, it is not material that he has quitted the house of the testator in the performance of his duty. Herbert v. Reid, 16 Ves. 481.

² Metcalf v. Sweeney, 17 R. I. 213, 21 Atl. R. 364. So, also, of a coachman hired with a team. Chilcot v. Bromley, 12 Ves. 114.

³ Ogle v. Morgan, 1 De Gex, M. & G. 359; In re Drax, Savile v. Yeatman, 57 L. T. 475.

⁴ Thrupp v. Collett, 26 Beav. 147.

⁵ Bielling v. Ellice, 9 Jur. 936.

⁶ Townshend v. Windham, 2 Vern. 546.

⁷ Armstrong v. Clavering, 27 Beav. 226.

⁸ Marcus v. Marcus, 56 L. J. Ch. 830, 57 L. T. 399. This condition will be strictly construed. In re Benyon, 53 L. J. Ch. 1165.

⁹ Darlow v. Edwards, 1 H. & C. 547.

servant who had been dismissed by an unauthorized person, where the testator, being a lunatic, had to give up house-keeping, will lose her legacy.¹

§ 605. Gifts to persons of a particular name.—A gift to a person of the name of A., whether the name be that of the testator or of some one else, is a gift upon a condition that the person is of that name.² Such a condition as this, being a condition precedent, means that the person's *surname* must correspond precisely with the name designated by the will. This is the primary meaning of the phrase "of the name of A.," but these words have a secondary meaning. To be of the name of A. may signify in its secondary sense to be of the family, or blood, or stock of A. Thus, a woman whose maiden surname is A. is of the name of A. in the latter sense, though, upon her marriage, her surname has *ipso facto* become B. Where a testator adds the qualification of name to a gift to his next of kin, or to his relations, requiring that they should be of his own name, it is obvious that he has restricted the meaning of the term "next of kin" or "relations," and that the word "name" is used in its primary sense as signifying those persons whose cognomen or surname is identical with that of the testator.³ In a case which was decided by Lord Hardwicke, the secondary meaning was applied to the term. In that case the testatrix gave her estate to "her nearest relations of the name of Pyots," in fee. When she died, three persons actually possessed the surname who were equally related to the testatrix, and there was another equally related to her and married, and who, at the death of the testatrix, was not of the name of Pyot. The heir at law of the testatrix was her nephew of the name of Pyot, though he was not related as nearly as the other claimants. He contended that either the devise was void altogether, or that he, being the heir at law of the name Pyot, had been designated by the testatrix as her "nearest relations" of that name. The court, in holding his claim un-

¹ In *re Hartley's Trust*, W. N., 4 May, 1878, 104; In *re Sharland* (Kemp v. Rosey, 1896), 1 Ch. 517. A gift of one year's wages goes to servants hired by the year only, and not to those who were hired by the week, and who do not reside with the family of the testator. *Booth v. Dean*, 1 Myl. & K. 560; *Blackwell v. Pennant*, 9 Hare, 511.

² § 516.

³ *Jobson's Case*, Cro. Eliz. 576; *Leigh v. Leigh*, 15 Ves. 92; *Bon v. Smith*, Cro. Eliz. 532.

founded, determined that the expression "the Pyots" described a particular stock or family, but not the whole family, for the words "nearest relations" limited it, and, the property disposed of being personal property, "relations" could not mean heir. The brothers and sisters of the testatrix, married and unmarried, should take equally among them, the change of name by marriage not being material.¹ This case was followed in a later case,² where the provision was that the estates of the testator should be kept in the Westerman's name, and in another case³ where the provision was that, in the event of the life tenant dying without issue, the property should be divided amongst all the next of kin of the surname of Crump, and a lady of that family was permitted to take, though not of the surname of Crump. But a woman who was originally of the name of A., but has assumed her husband's surname upon her marriage, has no claim under a devise to persons of the name of A., if that term is to be taken in its primary sense; and the same rule would seem to apply where the person who claims a legacy has changed his name by legislative enactment. The whole matter depends upon the intention of the testator. On principle, whether a person who has his name altered, either by judicial proceedings or by legislative enactment, to correspond with the name designated, would be entitled to a legacy, may well be doubted. Where a devise was to the *nearest kindred, being male and of the name and blood of the testator*, it was held that a man of the family and blood of the testator, but not of his name, had no title, though he had obtained a license from the king permitting him and his issue to assume the name in question.⁴

¹ Pyot v. Pyot, 1 Ves. 335.

² Mortimer v. Hartley, 6 Exch. 47.

³ Carpenter v. Bott, 15 Sim. 606.

⁴ Leigh v. Leigh, 15 Ves. 92.

CHAPTER XXX.

GIFTS TO THE HEIRS AND THE NEXT OF KIN AS PURCHASERS.

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| <p>§ 606. Words of limitation and words of purchase distinguished.</p> <p>607. Definition of the word "heirs" when used as a word of purchase.</p> <p>608. The inadmissibility of parol evidence to vary the meaning of the word "heirs."</p> <p>609. An heir takes as a purchaser land devised to him by his ancestor.</p> <p>610. The period at which class is to be ascertained where the gift is vested.</p> <p>611. Remainder to heirs after a life estate in one who is an heir at the death of the testator.</p> <p>612. Gifts to heirs of living person — Heirs apparent or presumptive — Recognition of ancestor as living.</p> <p>613. Devises to heirs peculiarly described — Heirs of a particular name.</p> <p>614. The construction of a devise to the "heir" in the singular.</p> <p>615. The meaning of the term "right heirs."</p> <p>616. Circumstances under which the word "heirs" is equivalent to the word "children."</p> <p>617. Heirs may mean children in a devise in fee, and, if the devisee die "without heirs," then over.</p> <p>618. When the word "heirs" means devisees or legatees.</p> <p>619. The word "heirs" in gifts of personal property means next of kin.</p> | <p>§ 620. Gifts of personalty to the heir or heirs as <i>persona designata</i>.</p> <p>621. Personal and real property blended in a gift to the heirs.</p> <p>622. Whether a husband or wife is included in the word "heirs."</p> <p>623. Whether heirs, when purchasers, take <i>per stirpes</i> or <i>per capita</i>.</p> <p>624. When a distribution <i>per stirpes</i> is favored.</p> <p>625. Statutory modification of the laws of descent.</p> <p>626. "Next of kin" <i>simpliciter</i> includes only nearest blood relations.</p> <p>627. Construction of the words "next of kin" when the statute of distribution is referred to.</p> <p>628. Next of kin specifically described as of a particular name or sex — Gifts to worthy next of kin.</p> <p>629. When the next of kin are to be ascertained as a class in case of immediate gifts.</p> <p>630. When ascertainable as a class if the vesting is postponed.</p> <p>631. Ascertainment of the class when a life estate is given to one of the next of kin.</p> <p>632. Immediate gifts to the next of kin of other persons than the testator.</p> <p>633. Presumption that testator means legitimate next of kin.</p> |
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§ 606. Words of limitation and words of purchase distinguished.—In a gift to the “heir” or “heirs,” either of the testator or of some other person, the word “heir” may be a word of limitation or a word of purchase. If the heir takes as a purchaser under a will, he takes an interest in his own right; that is to say, he takes not through or by descent from his ancestor. The heir takes under the will, without any reference to any previous existing estate in his ancestor. Thus, in the case of a limitation to A. for life, and after his death to his then living heir or heirs, the heir takes a separate and distinct estate under the will as a purchaser, and not by descent from his ancestor.¹ Where these words are words of purchase, the ancestor has no power of alienation which will affect the interest of the heirs; nor can he charge or incumber any estate which they are to take under the will.

On the other hand, if the word “heirs” in such a disposition is to be construed as a word of limitation and not as a word of purchase, the heirs take by descent from their ancestor, and their right and interest may be defeated or incumbered by his conveyance of the fee-simple. In the one case they are original and primary beneficiaries under the will, taking an interest which, whether contingent or vested, is alienable by them. In the other case their interest is mediate and secondary, and neither vested nor contingent; being in the latter case a mere expectation of inheriting from their ancestor, which is wholly subjected to be defeated by his conveyance of the fee-simple.²

¹ But see § 655 *et seq.*

² The explanation of Mr. Preston in 1 Preston's Estates, 86, is so lucid and satisfactory that it is inserted at length. “The expression ‘words of limitation’ is always used in contradistinction to the expression ‘words of purchase.’ By the former expression it must be understood that the interest limited by these words is not originally given to the *heirs*, but to their *ancestor*, either mediately, immediately or eventually, so as to create in him an estate or interest of inheritance descendible to his heirs of the given description. By the latter expression is meant such words

as give the estate limited by the term ‘to the heirs’ originally in their *own right* and as the persons answering that description, and not through the medium of, or by descent from, any ancestor; so that these heirs are the purchasers under the appellation of heirs, and are to take without any reference to a previous right in their ancestor, in whom the estate to pass by the limitation to the heirs cannot vest in any possible event. A consequence is that the power of alienation commences in the heirs and not in the ancestor; and the heirs, unless their interest shall be defeated under the rules applicable to con-

§ 607. **Definition of the word "heirs" when used as a word of purchase.**— Gifts of property, both real and personal, to the heir or heirs, either of the testator or of some other person, he being either living or dead, are of frequent occurrence in wills, particularly in those which are written without professional assistance. In the majority of cases of this description, the word "heir" or "heirs" is used in the most vague and general sense. The difficulty of construing the word is very frequently increased by the fact that the testator, in penning his will, has added to the word other terms or phrases, with the *intention of making his meaning clearer or more apparent*, but which only tend to obscure it. Under the general rule that technical words are to be taken in their ordinary sense, in the absence of language showing that they are used in any other, the word "heirs" will be taken to mean the person or persons upon whom, according to law, real estate descends in case the person who is mentioned as the ancestor had died intestate. Where the word "heir" or "heirs" is used as a word of purchase, and not as a word of limitation (which distinction has been explained in the last section),¹ its meaning is liable to be controlled, enlarged or limited by the words of the context.²

tingent remainders, will not be liable to the charges or bound by the conveyance of the persons who in point of fact and in reference to other property may be their ancestors."

¹ *Ante*, § 606.

² *Leake v. Watson*, 60 Conn. 498, 507; *Gold v. Judson*, 21 Conn. 616; *Rand v. Butler*, 48 Conn. 293, 298; *Jackson v. Alsop*, 34 Atl. R. 1104, 67 Conn. 259; *Ruggles v. Randall*, 38 Atl. R. 887, 70 Conn. 44; *Rawson v. Rawson*, 52 Ill. 62; *Richards v. Miller*, 62 Ill. 417; *Bland v. Bland*, 103 Ill. 12; *Kellett v. Shepard* (Ill.), 28 N. E. R. 751; *Peacock v. Albin*, 39 Ind. 25; *Davis v. Taul*, 6 Dana, 51, 52; *Furenes v. Severtsen* (Iowa, 1898), 71 N. W. R. 196; *Lord v. Bourne*, 63 Me. 368 ("statutory heirs"); *Symmes v. Moulton*, 120 Mass. 343, 344; *Haley v. Moston*, 108 Mass. 577; *Minot v. Harris*, 132

Mass. 528, 529; *Fabens v. Fabens*, 141 Mass. 395, 400; *Lincoln v. Aldrich*, 21 N. E. R. 671, 149 Mass. 368; *Proctor v. Clark*, 154 Mass. 45, 48; *Lincoln v. Perry*, 149 Mass. (1889), 368, 373; *Lawrence v. Crane*, 158 Mass. (1893), 392, 33 N. E. R. 605; *Smith v. Harrington*, 4 Allen (Mass.), 566; *Clark v. Cordis*, 4 Allen (86 Mass.), 466, 480; *Loring v. Thorndike*, 5 Allen (87 Mass.), 257, 269; *Lombard v. Boyden*, 5 Allen, 249; *Richardson v. Martin*, 55 N. H. 45; *Wood v. Keyes*, 8 Paige (N. Y., 1840), 365; *Campbell v. Rawdon*, 18 N. Y. 412, reversing 19 Barb. 494; *Cushman v. Horton*, 59 N. Y. 149, 151; *In re Allen*, 151 N. Y. 243, 45 N. E. R. 554; *Tillman v. Davis*, 95 N. Y. 17, 25-30; *Platt v. Mickle*, 32 N. E. R. 1070, 137 N. Y. 106; *Johnson v. Brasington*, 86 Hun, 106, 109; *Rogers v. Birckhouse*, 5 Jones' Eq. (58

§ 608. The inadmissibility of parol evidence to vary the meaning of the word "heirs."—To justify the court in construing the word "heirs" in any other than its strict, ordinary and technical sense, the intention of the testator to that effect must clearly appear.¹ The intention to depart from the technical meaning of the word must be apparent from the context of the will, for parol evidence is never received to vary the meaning of the word.² Thus, it cannot be shown by parol evidence that the testator wished to include the husband of a devisee in a devise to the heirs of said devisee,³ and the strict meaning of the word "heirs" will be adhered to, though the testator or other person whose heirs are mentioned had in fact but one heir.⁴ But parol evidence of the circumstances of the family of the person who is the ancestor may always be received where it is a question of identifying those who claim the testamentary provision for heirs as a class.

§ 609. An heir takes as a purchaser land devised to him by his ancestor.—In the absence of a statute repealing the rule, it is a rule that, where an estate in land which is devised by a man to his heir or heirs is precisely the same in its character and amount as the heir or heirs would have taken by descent, the devise, as such, is void. The heir or heirs will then take that estate by descent, and not as purchasers under the will of the ancestor.⁵ This ancient and well settled rule

N. C., 1860), 304; Porter's Appeal, 45 Pa. St. 201; Eby's Appeal, 50 Pa. St. 311; Clark v. Scott, 67 Pa. St. 446; Burges v. Thompson, 13 R. L. 712; Evans v. Harllee, 9 Rich. (S. C.) 501; Rochelle v. Tomkins, 1 Strobb. (S. C., 1846), Eq. 114; Seabrook v. Seabrook, McMullen's (S. C., 1841) Eq. 206; Aydlett v. Swope (Tenn.), 17 S. W. R. 208; Aspden's Estate, 2 Wall. Jr. (C. C.) 368; Boman v. Boman, 49 Fed. R. 329, 1 C. C. A. 274; Gittings v. McDermott, 2 My. & K. 69; De Bouvoir v. De Bouvoir, 3 H. L. Cas. 524; In re Rootes, 1 Dr. & Sm. 228, 12 Lawy. Rep. Ann. 721, 13 Lawy. Rep. Ann. 46; 4 Kent, 222.

¹ Gold v. Judson, 21 Conn. (1852), 616; Rand v. Butler 48 Conn. (1881), 293, 298.

² Love v. Buchanan, 40 Miss. 748; Aspden's Estate, 2 Wall. Jr. C. C. 368; O'Hara on Cons. of Wills, 297.

³ Lincoln v. Aldrich, 21 N. E. R. 671, 149 Mass. 368.

⁴ Rand v. Butler, 48 Conn. 293, 298.

⁵ 2 Black., p. 242; Co. Lit. 22 B.; 4 Kent, 507; 1 Powell, 414, 427; Rawson v. Rawson, 52 Ill. 62; Cribben v. Cribben, 136 Ill. 609, 613; Ellis v. Page, 7 Cush. (Mass.) 161, 163; Howard v. Howard, 19 Conn. 313, 318; Whitney v. Whitney, 14 Mass. 88, 90; Parsons v. Winslow, 6 Mass. (1810), 178; Sedgwick v. Minot, 6 Allen (88 Mass., 1863), 171, 173; Seabrook v. Seabrook, 10 Rich. (S. C.) Eq. 495, 508; Williman v. Holmes, 4 Rich. Eq. (S. C., 1850), 475; In re Root, 81 Wis. 263, 266; Barnitz v. Casey, 7 Cranch, 456;

of the common law is applied, in the absence of a statute, to all devises by the testator to his heir or heirs, whether he shall designate such person or persons by his or their names, or whether the provision is for them simply as his "heirs," "his right heirs," or "legal heirs;" and also where he in his will orders his lands to be distributed as though he had died intestate.¹

The rule is based upon the theory that a title by descent is of more advantage to the heir than is a title by purchase; for by the former title the right of entry is cut off from any one who may have claimed it, and an heir who takes by descent may claim the benefit of a warranty contained in a conveyance to his ancestor. It is immaterial that the testator shall, after creating one or more intermediate estates, give to his heirs a so-called remainder in fee after a life estate in a stranger, or on the termination of an estate tail, or an executory devise on a fee defeasible on a definite failure of the issue of the prior taker, or an estate after any future interest or executory devise.² Nor is it material that, after an estate in fee given by will to his heir, the testator provides that it shall go over to another upon the happening of a contingency, as, for example, on the death of the heir during his minority.³

The fact that the property which is devised to the heir of the testator is charged with the payment of the debts of the testator, or with legacies⁴ or annuities,⁵ does not affect the application of the rule that the heir shall take by descent.⁶ But in order that it shall apply, it must be shown that the testator has given to his heir, by the devise, an estate in his land of precisely the same tenure, quality and quantity as the heir would have taken by descent had not the will been made.⁷ In England⁸ and in some states the rule of the common law, that an

Smith v. Triggs, 1 Str. 487; Scott v. Scott, Amb. (1759), 383.

¹ 2 Preston on Estates, 17.

² Ellis v. Page, 7 Cush. (Mass., 1851), 161, 163; Manbridge v. Plummer, 2 My. & K. 93; Preston v. Holmes, Styles, 148.

³ Doe v. Timins, 1 Bar. & Ald. 530, 549; Hinde v. Lyon, Dyer, 124, 2 Leon. 11, 3 id. 70.

⁴ Clarke v. Smith, Lutch. 792, 1 Salk. 241, Cro. Eliz. 833.

⁵ Emerson v. Inchbird, 1 Ld. Ray. 728.

⁶ Biederman v. Seymour, 3 Beav. 368, 371; Chaplin v. Leroux, 5 M. & Sel. 143.

⁷ Ellis v. Page, 7 Cush. (61 Mass., 1851), 161, 164; Parsons v. Winslow, 6 Mass. 169, 177.

⁸ 3 & 4 Wm. IV, c. 106, § 3.

heir takes land devised as by descent, is modified by statute. Thus, in the state of New York, a direction that the real and personal property which is devised shall, at the termination of a life estate in it, be divided according to the statutes governing the descent of such property, gives the heirs of the testator vested remainders in fee.¹

§ 610. The period at which class is to be ascertained where the gift is vested.— In the absence of a clear indication of a contrary intention, it is the rule that the words “heir,” “next of kin,” or “relations,” in a devise by the testator to his “heirs,” “next of kin,” etc., mean those who are such at his death. This is usually the rule if the devise to the heirs is vested, though an intermediate estate is given which postpones the possession. Their interest vests at once, though the testator has given a life estate to another.² If a gift by the testator is in remainder to the heirs of another, the testator will be presumed to mean those who are the heirs of that person at the time of his death, and the remainder is therefore contingent during the life of the ancestor.³

¹ *Hersee v. Simpson*, 48 N. E. R. 890, 154 N. Y. 496, 46 N. Y. S. 755; *Lawton v. Corlies*, 127 N. Y. 100, 107.

² *Bunting v. Speek*, 41 Kan. 424, 21 Pac. R. 288 (1889); *Abbott v. Bradstreet*, 3 Allen (Mass.), 587, 589; *Pinkham v. Blair*, 57 N. J. Eq. (1897), 226, 232, 1 Am. Prob. R. 114, 120, 123; *McDaniel v. Allen*, 64 Miss. 417, 1 S. R. 356; *Smith v. Harrington*, 4 Allen, 566; *Minot v. Harris*, 132 Mass. 528, 529; *Childs v. Russell*, 11 Met. 16; *Knight v. Knight*, 3 Jones (N. C.), 167, 169; *Aspden's Estate*, 2 Wall. Jr. C. C. 368; *In re Tucker's Will*, 63 Vt. 104, 21 Atl. R. 272; *Doe v. Lawson*, 3 East, 278; *Bird v. Luckie*, 8 Hare, 301; *Philps v. Evans*, 4 De Gex & S. 188; *Doe d. Pilkington v. Spratt*, 5 Har. & Ad. 731; *In re Ford*, 72 L. T. 5; *Johnson v. Webber*, 33 Atl. R. 506, 65 Conn. 501; *Rand v. Butler*, 48 Conn. 293, 299 (for life to A., remainder to lawful heirs of testator); *Ingraham v. Ingraham*, 48 N. E. R. 561 (Ill.); *Childs v. Russell*, 11 Met.

(52 Mass., 1846), 16, 23; *Brown v. Lawrence*, 3 Cush. (57 Mass., 1849), 396, 397; *Buzby's Appeal*, 61 Pa. St. 114; *Wood's Appeal*, 18 Pa. St. 478; *Reinders v. Koppelman*, 68 Md. 482; *Hersee v. Simpson*, 154 N. Y. 496, 48 N. E. R. 890; *Walker v. Donohue*, 38 Pa. St. 439.

³ *Rogers v. Ogbourne*, 37 Ala. 178; *Healy v. Healy*, 70 Conn. 467, 39 Atl. R. 97; *Vinson v. Vinson*, 33 Ga. 454; *Read v. Fogg*, 60 Me. 479; *Preston v. Brant*, 96 Mo. 552, 10 S. W. R. 78; *Ryan v. Monaghan*, 99 Tenn. 338, 43 S. W. R. 144; *Reinders v. Koppelman*, 68 Mo. 482; *Persons v. Snooks*, 40 Barb. (N. Y.) 144; *Knight v. Weatherwax*, 7 Paige (N. Y.), 182. Thus, a gift to A. and her husband for their *joint* lives, but at *her* death to be divided amongst *her* heirs, means, where she survives her husband, her heirs at *that time*. *Richardson v. Wheatland*, 7 Met. (Mass.) 169. The rules of the text regulating the construction of the word “heirs”

§ 611. Remainder to heirs after a life estate in one who is an heir at the death of testator.—Under some circumstances, where a life estate precedes a gift in a will to the heirs or next of kin of the testator, it may appear that the testator intended to include among his heirs such persons only as would answer to that description at the termination of the life estate. This question frequently arises where a testator gives a life estate to A., *who, at the death of the former, is his sole heir* or nearest of kin, and a remainder in fee to his heirs or next of kin, to vest in possession at the termination of the life estate. It would seem that the facts that the first taker *was sole heir of the testator at the time of the testator's death*, and that he gave a remainder to his heirs, would indicate that he meant such persons to take as heirs who would have been his heirs had he (the testator) survived the life tenant. This has been held in many cases.¹ Thus, where a testator gave his daughter a life estate with a remainder at his death, “as though I died intes-

are based upon the general principle that the law favors an early vesting. If, from the context, it is plainly apparent that the testator meant to give an immediate vested gift to his own heirs, the estate given will vest in those persons who, at the death of the testator, form the class heirs, in spite of the fact that their possession may have been postponed. The remainder to the heir or heirs, having vested, is descendible and devisable, and cannot be defeated by the fact that the person or persons who are the heir or heirs of the testator at the termination of the life estate are not the same as those who occupy that relation to him at his death. Where the devise is to the heir of another, as to the heir of A., that person shall take it who is the heir of A. at A.'s death. If A. shall die during the life-time of the testator, the person who is *then* his heir and who also survives the testator takes on the death of the testator a present vested interest, which also vests in possession unless the testator has expressly postponed the posses-

sion. If A. is alive at the death of the testator, a devise to his heir or heirs is an executory devise and will vest in those who may be his heirs at his death in the future. But where a life estate is given to another and remainder to A.'s heirs, it is a contingent remainder which vests in the heirs of A. upon A.'s death during the prior life estate. A devise of an estate “for the use, benefit and behoof of my daughter . . . during her natural life, and for the use of the heirs of my said daughter after the death of my said daughter,” creates a contingent remainder in the heirs of the daughter, which does not become vested until her death; it appearing that the will was drawn by one who clearly understood the meaning of the terms employed, and there being nothing to indicate that the word “heirs” was not used in its technical sense. *Wallace v. Minor*, 86 Va. 550, 10 S. E. R. 423.

¹*Jones v. Colbeck*, 8 Ves. Jr. 88; *Long v. Blackall*, 3 Ves. 486; *Butler v. Bushwell*, 3 My. & K. 232. Cf. *Briden v. Hewlett*, 2 My. & K. 90.

tate," it was held that he meant as though he died intestate after the daughter, and consequently that his heirs *at that time* would take. His daughter, the life tenant, who was his sole heir at his death, was therefore excluded.¹ But where the testator devised land in trust for his son D. "for and during the term of his natural life," and on the death of the son the testator gave the said property to "*my (the testator's) own right heirs*," the court held that at once, at the death of the testator, the remainder vested in the then living heirs of the testator. The son and life tenant was the sole heir of the testator at his death, and when he subsequently died intestate and childless, the property went to his heirs rather than to the heirs of the testator living at the death of the son.²

But the cases are by no means harmonious on this point, and several hold that the fact that the previous estate is given expressly to the heir, to whom is also given the remainder, does not prevent the operation of the general rule that the word will be construed as meaning those³ who are heirs at the death of the testator.⁴ Where the testator, in the year 1830, gave

See also *Donohue v. McNichol*, 61 Pa. St. 73; *Heard v. Read*, 169 Mass. 216, 47 N. E. R. 778; and *cf. contra*, § 631.

¹ *Welch v. Brimmer*, 47 N. E. R. 699, 169 Mass. 204; *Pierce v. Hubbard*, 152 Pa. St. 18, 31 W. N. C. 185; *Heard v. Read*, 47 N. E. R. 778, 169 Mass. 216; *Forrest v. Porch*, 100 Tenn. 391, 45 S. W. R. 676.

² *In re Kenyon*, 17 R. L. 149, 20 Atl. R. 294.

³ The principle of construction which was applied in *Jones v. Colbeck*, 8 Ves. Jr. 38, where the devise was to a daughter of the testator for life, and upon the decease of the said daughter the fund was to be distributed "*among the relatives*" of the testator, may be applied to a gift to the heir or heirs of the testator after a life estate in one who is his sole heir at his death. The court in that case excluded the personal representative of the daughter and ascertained the class "relatives" as it existed at *her* death. In another

case (*Briden v. Hewlett*, 2 My. & K. 90), where the testator, giving a life estate to his mother with a power of appointment of the fee by will, and a devise in default of appointment "*to such person or persons as would be entitled to the same by the statute of distribution*," and the mother was the sole next of kin at the death of the testator, the court observed: "It is impossible to contend that this testator meant to give the property absolutely to his mother, because he gives it to her for life with a power of appointment. In case of her death without a will, the testator gives his property to such person or persons who would be entitled to it by virtue of the statute of distribution. Entitled at what time? The word 'would' imports that the testator intended his next of kin at the death of the mother."

⁴ In the English case of *Wrightson v. Macaulay*, 14 Mee. & Wel. 214, a life estate was by the testator given

land to his daughter and her husband, but, if the daughter should die without issue surviving, the land to go to the heirs of the testator, and the daughter died in 1884 without having had and without leaving issue, the court held that the testator meant those who were his heirs at the time of his death. Hence, as the daughter was sole heir of the testator, she took the fee in either event.¹ So, too, where the testator says, "I give my property to my legal heirs, in the same proportion as they would have inherited if I had survived my wife," giving her in the will a life estate, he will be conclusively presumed to mean those who would have been his heirs if he had died immediately after his wife.² And where the testator devises land to his wife for her life, and after her death to be equally divided among his and her heirs, he means the estate to vest in those of his heirs who survive the wife.³

§ 612. Gifts to heirs of living person — Heirs apparent or presumptive — Recognition of ancestor as living.—In strictness of language, no one is the heir of a living person, under the well-known maxim "*Nemo est hæres viventis.*" Hence, if the testator shall devise land to the heir or heirs of A., who is living at the execution of the will, and is mentioned in the will as living, the devise, if we take the word "heirs" in its strict and technical sense, will be void.⁴ In such cases it may appear from the context of the will that the testator did not mean to use the word in its technical sense, but that he meant it in

to his son, who was his sole heir. The testator then, after several intermediate estates in remainder, gave the fee to "*his own right heirs, and his, her and their heirs and assigns forever.*" When it became necessary to construe this will, after the determination of the several remainders, the court held that a remainder in fee vested in the son of the testator at the death of the latter. So, too, in *Rawlinson v. Wass*, 9 Hare, 673, where property was given in trust for the daughter of the testator, who was his sole heir, and remainder as she should appoint, and in default to the heirs and assigns of the testator, equity decreed that an immediate

conveyance of the property should be made to the daughter at the death of the testator. *Boydell v. Golightly*, 14 Sim. 327.

¹ *Stokes v. Van Wyck*, 3 S. E. R. 337 (1887), 83 Va. 724; *In re Kenyon*, 17 R. L. 149 (1890), 20 Atl. R. 294; *Doe v. Gooden*, 6 Houst. (Del.) 397.

² *Peck v. Carlton*, 154 Mass. 231, 234.

³ *Bisson v. West. R. Co.*, 38 N. E. R. 104 (1894), 143 N. Y. 125; *Hardy v. Gage*, 66 N. H. 582 (1891). *Contra*, *Walker v. Dunshee*, 38 Pa. St. 439 (1861). See also cases cited *post*, § 631.

⁴ *Challoner v. Bowyer*, 2 Leon. 70, *Dyer*, 99 b., pl. 64, 1 Coke, 66.

some other secondary signification. He may have meant by "heirs of A.," whom he mentions as alive, the heirs apparent of such person,—that is to say, those who would be his heirs if he were dead.¹

Some of the authorities hold that, in order that the word "heirs" shall be construed to mean "heirs apparent" or "heirs presumptive," it must appear from the face of the will itself that the testator knew the ancestor was alive at the date of its execution. Parol evidence extrinsic to the will is not admissible to vary the meaning of the word "heirs." The knowledge by the testator of the existence of the ancestor is evidenced only by language in the will recognizing his existence. Such language need not, of course, be an express statement that the testator knows the ancestor is living. He may recognize him as alive by a legacy to him, as by providing a fund, the interest of which is to support him during his life;² by his manner of speaking of the heirs, as when he devises property to those who are *now* the heirs of A., and he has given A. something by that name in another clause of the will;³ by a devise to the heirs of B., "who lives in the town of C.;"⁴ by a devise to the heirs of B. "*now living*;"⁵ or by devises to the heirs of A. and B., who, the testator states, are *deceased*, and the heirs of C.,

¹ *Bacon v. Fitch*, 1 Root (Conn., 1790), 181; *Leake v. Watson*, 60 Conn. 498, 510, 21 Atl. R. 1075; *Strain v. Sweeney*, 45 N. E. R. 20, 163 Ill. 603; *Durbin v. Redman*, 140 Mass. 694; *Feltman v. Butts*, 8 Bush (Ky., 1871), 115, 119; *Howell v. Ackerman* (Ky.), S. W. R. 819; *Hughes v. Clark* (Ky.), 26 S. W. R. 187; *Morton v. Barrett*, 23 Me. 257, 265; *Barton v. Tuttle*, 62 N. H. 558, 560; *Vannorsdall v. Van Deventer*, 51 Barb. (1867), 137, 146; *Cushman v. Horton*, 59 N. Y. 149, 151, 154; *Harris v. Philpot*, 5 Ired. Eq. (N. C.) 324, 328; *Knight v. Knight*, 3 Jones' Eq. (56 N. C.) 167, 169; *Holeman v. Fort*, 3 Strobb. (S. C.) 66, 73; *Barber v. Pittsburgh, F. W. & C. Ry. Co.*, 17 S. Ct. 488, 166 U. S. 83, 108; *James v. Richardson*, 1 Vent. 384, 2 Lev. 232, T. Raym. 330, 1 Eq. Cas. Abr. 214; *Burchett v. Durdant*, 2 Vent. 311;

Goodright v. White, 2 Wm. Black. 1010; *Doe v. Perratt*, 5 B. & Cr. 48; *Loveday v. Hopkins*, Amb. 273. A devise to the heir of A., and *in default of such heir* then to A. for his life, cannot refer to him who is heir at A.'s death, but to the eldest son and heir apparent. *Lord Beaulieu v. Cardigan*, Amb. 533. In *Darbison v. Lord Beaumont*, 1 P. W. 229, the provision was for the heirs male of the body of E. L., to whom also a legacy was given. The devise was executory, and, on the intermediate limitations falling in during the life of E. L., her eldest son was allowed to take.

² *Cushman v. Horton*, 59 N. Y. (1874), 149, 153; Amb. 533.

³ *Barton v. Tuttle*, 62 N. H. 558, 560.

⁴ *Carne v. Roche*, 7 Bing. 228.

⁵ *James v. Richardson*, 1 Vent. 384.

who is merely mentioned by name.¹ In all such cases, where the ancestor has children living they will be presumed to be the persons intended, and they will take an immediate interest. The presumption is that the testator, in the case of a devise to his own heirs, means those who are such at his death, and not those who are his heirs presumptive or heirs apparent; and the construction in favor of those who are his heirs apparent will yield readily to the indication of a contrary intention from the context of the will.²

§ 613. Devises to heirs peculiarly described — Heirs of a particular name.—No rule of law prevents a testator from modifying his provisions for heirs as purchasers, whether they are his own heirs or the heirs of another person, by adding particular qualifications to the term “heirs,” where the word is used as a word of purchase. If the word “heirs” is used in the will as a word of limitation, it must be taken in its ordinary sense as meaning those upon whom the real estate devolves in case of the intestacy of the ancestor, and the testator cannot, by adding words of description or modification, create a new kind of inheritance which would be contrary to the established rules of law. The superfluous words will be rejected and the estate devised will descend to the heirs general.³

But a devise to “my own right heirs of the name of T.,”⁴ or “to the right heirs of the testator being of the name of H.,”⁵ where the word “heirs” is a word of purchase, is valid.⁶ And

¹ Vannorsdall v. Vandeventer, 51 Barb. (N. Y., 1867), 137, 146; Simons v. Garrett, 1 Dev. & Bat. Eq. (21 N. C.) 336, 393.

² In some cases, where the testator has not in the will recognized the ancestor as living, it has been held that the word “heirs” might be construed as “heirs apparent.” Morton v. Barrett, 22 Me. (1843), 257, 265; Flint v. Steadman, 36 Vt. (1863), 210; Cox v. Beltzhoover, 11 Mo. (1845), 142. A devise of land to A. “for his life and the life of his heir” is valid, and the effect is to give to the devisee an estate during his own life and the life of the person who should be his heir at his death. In re Amos

(1891), 8 Ch. 159; Carrier v. Price, Id. The fact that the ancestor is an alien and incapable of holding land is not material where a devise to the heir of A. is construed to mean the heir apparent, as the heir takes as *persona designata*.

³ Johnson v. Whiton, 159 Mass. 424, 425, 34 N. E. R. 543 (“to A. and her heirs on her father’s side”); Gibbon v. Gibbon, 40 Ga. 562 (“heirs of the full blood”).

⁴ Thorpe v. Thorpe, 8 Jur. (N. S.) 891, 10 W. R. 778, 32 L. J. Exch. 79.

⁵ Wrightson v. Macaulay, 14 Mea. & Wel. 214, 232.

⁶ Counden v. Clerke, Moore, 860, pl. 1181, Hob. 29.

a remainder to the heir of the testator "*of the name of H.*" vests in him who answers to the description at the death of the testator, though he is also the tenant of the life estate.¹ So where the testator devised land "to his *male* heirs who may live in S.," and dying, left only *female* heirs, the court held that, as he had excluded not only *all* female heirs, but also *all* heirs who did *not* live in S., the land should go to his nearest male relative who resided in S. at the date of the testator's death.² So, too, a devise after a life estate to "the descendants and heirs at law of the life tenant, if any, according to the laws of descent and distribution," can only be claimed by heirs at law who are also descendants. A mother and a brother and a sister of the half blood of the life tenant cannot take as descendants and heirs at law.³

§ 614. **The construction of a devise to the heir in the singular.**—The English cases have settled the rule of construction that a devise to *A. and to his heir* confers a fee-simple on *A.*,⁴ and a gift to *the heir of A.* would most likely include all persons who are his heirs at the date of his death who would take by purchase,⁵ the word "heir" being *nomen collectivum*, and including, in itself, all upon whom the land descends according to law. Thus, in an early American case, it was held that a devise to the "*male heir of the body of A. lawfully begotten*" created a fee-tail in all the sons of *A.*⁶ But of course a devise to the heir or male heir of *A.* "for the term of his natural life," while it might, in America at least, make all the heirs or male heirs tenants in common, would not create more than an estate for life in any one of them. And by the English cases it is held that though a gift to *A. and the heir of his body*

¹ Wrightson v. Macaulay, 14 Mee. & W. 214, 232.

² Keeler v. Keeler, 39 Vt. (1836), 555, 556. Under a gift to *A.* and "her heirs by blood," an illegitimate son of *A.* was included, he being her heir by statute. Hayden v. Barrett, 52 N. E. R. 530 (Mass., 1898).

³ Tichenor v. Brewer's Executor, (Ky., 1896), 33 S. W. R. 86.

⁴ Skinner, 385, 583.

⁵ Williams v. Holmes, 4 Rich. Eq. (S. C.) 475; Mounsey v. Blamire, 4

Russ. 384; Burchett v. Durdant, Skin. 206, Co. Litt. 10 A. The rule of the text to the effect that all take a devise to the heir in the singular, who are heirs at the death of the ancestor, is illustrated in Mounsey v. Blamire, 4 Russ. 384, where a fund was given "to my heir," and it was divided among three co-heiresses, the daughters of the testator.

⁶ Larabee v. Larabee, 1 Root (Conn., 1793), 555.

confers an estate tail upon A., nevertheless a devise to the heir of the body of A., the heir taking here by purchase, would not confer an estate tail upon him.¹ The heir of the body mentioned in the singular takes by purchase as *persona designata*, and, in the absence of a statute by which a devisee is to take a fee in the absence of a contrary intention shown expressly or by necessary implication, he would only take a life estate. More recently it has been held that a limitation over, in the case of the death of a person without *an heir*, or without *a lawful heir*, meant without leaving issue or children him surviving, which construction has the effect of making the word "heir," used in the singular, equivalent to "heirs of the body."²

§ 615. The meaning of the term "right heirs."—The words "right heirs," in a devise of land or gift of personalty, are synonymous with heirs or heirs at law.³ Thus, a gift of personal property to the "right heirs of A." will go to those persons upon whom real estate would descend, but not to the husband or personal representatives of A.⁴ In one case, where the

¹ Chambers v. Taylor, 2 My. & Cr. 376.

² Woodruff v. Pleasants, 81 Va. (1865), 40; Rollins v. Kell, 20 S. E. R. 209, 115 N. C. 68; Benson v. Linthicum, 75 Md. 141, 23 Atl. R. 133; King's Heirs v. King, 12 Ohio (1843), 390, 471. A devise to the heir of A. differs from a devise in which the testator says, "I make A. my heir." In the latter case A. takes the fee-simple. Spark v. Purnell, Hob. 75; Richards v. Bergavenny, 2 Vern. 324. "These cases prove that the word 'heir' in the singular number has sometimes the same effect as the word 'heirs' in the plural; but if words of limitation are superadded to the word 'heir,' it is considered as conclusively showing that the word is used as a word of purchase. When that is not the case it is considered in construing wills as *nomen collectivum* for the purpose of creating an estate tail in the first taker, and not as creating an estate tail in the person answering the description of heir.

If the word would *per se* give an estate of inheritance to the party answering the description, there would be no reason for any distinction whether words of limitation or inheritance were or were not superadded. These cases therefore prove that the daughters would not have taken estates of inheritance as purchasers under the will; and it is not pretended that their parents took more than estates for life." By Lord Cottenham in Chambers v. Taylor, 2 My. & Cr. 376. A devise to the person or persons "who at my death shall be the *heir* or heirs at law of A." was held to convey a life estate. Doe d. Sams v. Garlick, 14 M. & W. 698.

³ 1 Washb. on Real Property, 72; In re McCrea's Estate, 180 Pa. St. 81, 36 Atl. R. 412.

⁴ Mason v. Bailey (Del., 1888), 14 Atl. R. 309; Williman v. Holmes, 4 Rich. (S. C.) 475; Gordon v. Small, 53 Md. 550; De Beauvoir v. De Beauvoir, 15 Sim. 163, 3 H. L. Cas. 524. See also

gift was "to my own right heirs of the name of H. I.," the words were held to mean the "heir at law."¹

§ 616. **Circumstances under which the word "heirs" is equivalent to the word "children."**—It may appear from the context that the testator has used the words "heir" and "heirs," not in their strict and primary sense, but in a limited sense, and as synonymous with the words "child" or "children." Cases of this sort are extremely numerous, and they may be illustrated by the following example: A testator, having several children alive at his death, devises property to them as a class *in equal shares*, to be enjoyed by each of them during his or her natural life, and on his or her death the share of each to go to his or her "heirs." From the equality of division which the testator has made among his children, it may well be presumed that he did not use the word "heirs" in its primary sense, for, if he did, the share of one of his children who died without leaving a child would go to his brothers and sisters, who, in such event, would be his heirs.²

On the other hand, if we assume that the testator, by the word "heirs," meant children, we have a remainder vested in the children of each devisee as a class, which is subject to open and let in all after-born children.³ If this be so, then any of

Thorpe v. Thorpe, 8 Jur. (N. S.) 871, 82 L. J. Exch. 79, 10 W. R. 778.

¹ In re Ford, 72 L. T. 5.

² In the early case of Loveday v. Hopkins, reported in Ambler, 278, the testator first gave a pecuniary legacy to "my sister Loveday's heirs," and then another sum to be equally divided among the *children* of another sister. The former, at the date of the will, had two children, one of whom married and predeceased the testator, leaving three children who claimed as heirs. The court held that the two legacies assimilated, and that the child of Mrs. Loveday, who survived the testator, took the legacy to Mrs. Loveday's heirs to the exclusion of the children of the deceased child. And in another case decided in the English chancery, where, after six life estates running concurrently in a trust fund,

the testator directed that the share of any beneficiary dying should "*be sold and divided among his heirs*," the court, construing the word "heirs" to mean children, said: "I am at a loss to conceive why he should direct the property to be sold except for the purpose of division amongst a larger class than the tenants for life. He does not think that six persons are too many to hold and enjoy it in common, but he does think it necessary to direct that after their deaths it shall be sold for the purpose of division. Where there is a gift of personal property to one for life, and after his death amongst his heirs, I should have no doubt that the expression 'heirs' would apply to children." Sir J. Romilly, M. R., in Bull v. Comberbach, 25 Beav. 540.

³ Ante, § 558.

the children designated by the word "heirs" may dispose of his or her interest during the life-time of the parent. This construction is strengthened if the testator directs that on the death of the life tenant without children the property shall descend to *his* heirs. So in England it has been said that this construction will always be had where the direction is to divide the property among the heirs of a life tenant after the expiration of his estate.¹ And a gift to the heirs of A. that "he *now* has," or to the heirs of B. "should *they* arrive at the age of twenty-one," or to the heirs of C., the *wife of D.*, means children in each case.² So where a testator gave property to his daughters by name, and to *their heirs*, stating that he wishes his daughters and *their children* to have the full benefit, the word "heirs" can mean nothing else but children.³

¹ Bull v. Comberbach, 25 Beav. 40. In the following cases the word "heirs" was held to mean children: Bond's Appeal, 31 Conn. 183; Baxter v. Winn, 13 S. E. R. 634, 87 Ga. 239; McCartney v. Osburn, 118 Ill. 403; Underwood v. Robbins, 117 Ind. 308, 310; Levengood v. Hoople, 124 Ind. 27, 29; Conger v. Lowe, 124 Ind. 368, 374, 24 N. E. R. 889; Jackson v. Jackson, 127 Ind. 346, 349; Stevens v. Flanigan, 131 Ind. 122, 127; Essick v. Caple, 131 Ind. 207, 209; Allen v. Craft, 109 Ind. 476, 480; McNutt v. McNutt, 116 Ind. 545, 560; Tinder v. Tinder, 131 Ind. 381, 388; Williamson v. Williamson, 18 B. Mon. (57 Ky.) 329; Turman v. White, 14 B. Mon. (58 Ky.) 560; Hughes v. Clark (Ky.), 26 S. W. R. 187; Morton v. Barrett, 22 Me. 257, 267; Bowers v. Porter, 4 Pick. 198; Ellis v. Essex Bridge Co., 2 Pick. (Mass.) 243; King v. Little, 1 Cush. (Mass.) 436, 442; Haley v. Boston, 108 Mass. 579; Maguire v. Moore (Mo. Sup.), 18 S. W. R. 897; Wiggin v. Perkins, 5 Atl. R. 904, 64 N. H. 36, 38; Den v. Laquear, 4 N. J. L. 301, 305; Norris v. Beyea, 13 N. Y. 273, 280; Taggart v. Murray, 53 N. Y. 233, 238; In re Logan's Estate, 30 N. E. R. 485, 131 N. Y. 456, 460; Eldridge v. Eldridge, 41 N. J. Eq. 89, 91; Davis

v. Davis, 39 N. J. Eq. 13; Ballentine v. Wood, 42 N. J. Eq. 552, 9 Atl. R. 582; Johnson v. Brasington, 86 Hun. 104; Stewart v. Powers, 9 Ohio Cir. Ct. R. 143; Id., 2 Ohio Dec. 219; Vannorsdall v. Vandeventer, 51 Barb. (N. Y., 1868), 137; Hard v. Ashley, 117 N. Y. 606, 614; Scott v. Guernsey, 48 N. Y. 106; Kiah v. Grenier, 56 N. Y. 220, 225; Knight v. Knight, 3 Jones' Eq. (56 N. C., 1856), 167; Ward v. Stow, 2 Dev. Eq. (N. C.) 309; Harris v. Philpot, 5 Ired. Eq. (40 N. C., 1848), 324; King v. Beck, 15 Ohio (1846), 559; Bunnell v. Evans, 26 Ohio St. 409, 410; Jones v. Lloyd, 33 Ohio St. 572, 578, 580; Findlay v. Riddle, 3 Binn. (Pa., 1810), 139; Eby v. Eby, 5 Pa. St. 461; Urich's Appeal, 86 Pa. St. 386, 391, 2 W. N. C. 550; Titzell v. Cochran (Pa., 1887), 10 Atl. R. 9; Haverstick's Appeal, 103 Pa. St. 394; Brasington v. Hanson (Pa. Sup.), 24 Atl. R. 344; Drum v. Miller, 18 Pa. Co. Ct. R. 318; Holeman v. Fort, 3 Strobb. (S. C.) Eq. 66; Dukes v. Faulk, 37 S. C. 255; Blair v. Snodgrass, 1 Sneed (23 Tenn.), 1; Hinton v. Milburn, 23 W. Va. 166; Myrick v. Heard, 31 Fed. R. 244.

² Barton v. Tuttle, 62 N. H. 558.

³ Brumfield v. Dooks, 101 Ind. 191, 195; Evans' Estate, 155 Pa. St. 646, 26

§ 617. Heirs may mean children in a devise in fee, and if the devisee die without heirs, then over.—The word “heirs” is sometimes construed as precisely synonymous with the word “children” under the following circumstances: The testator gives property to A. and his heirs, or he gives property to A. in such language as will, under the statute, give him the fee-simple *with a limitation over to B. if A. should die “without heirs.”* If A. shall die leaving children, it does not of necessity follow that they are to take an estate in remainder as purchasers by implication, for if A. has a fee-simple he has the power to alienate it at any time before or at his death. If A. shall have a fee with a proviso that if he die without heirs, meaning children, it goes to others, he takes at common law an estate tail, but in America a defeasible fee, or a fee conditional, which becomes absolute in him and his children as soon as he shall have any. They will take by descent, *i. e.*, by limitation, and the estate, which is limited over to B. upon his death “*without heirs,*” will vest only in case he shall die *without leaving children surviving him*. It will be defeated, though he may die leaving other heirs surviving him.¹ A devise to A., and, if he shall have a lawful heir, then in fee to the said heir, and, if A. shall *die without an heir*, then over to B., gives A. a life estate, with a remainder to his children at his death;² and a devise to M. and W., in general language, but, if either of them should *die without leaving an heir*, then to the sur-

Atl. R. 739. If the testator uses the word “heirs” in speaking of his own children, it may be reasonable to presume that he uses it to describe their children. *Lott v. Thompson*, 36 S. C. 38, 15 S. E. R. 278. See *post*, § 662, as to the application of the rule in *Shelly’s case*, where “heirs” is equivalent to “children.”

¹ *Anthony v. Anthony*, 55 Conn. (1887), 256, 11 Atl. R. 45; *Underwood v. Robbins*, 20 N. E. R. 230, 117 Ind. 808, 310; *Jones v. Miller*, 13 Ind. (1859), 337; *Pratt v. Flamer*, 5 H. & J. (Md., 1820), 10, 22; *Lednum v. Cecil*, 76 Md. 149, 24 Atl. R. 452; *Terry v. Briggs*, 12 Met. (Mass.) 17; *Cody v. Bunn*, 46 N. J. Eq. 131, 18 Atl. R. 857;

Bundy v. Bundy, 38 N. Y. (1868), 410; *Taggart v. Murray*, 53 N. Y. (1873), 223, 238; *Francs v. Whitaker*, 116 N. C. 518, 21 S. E. R. 175; *Hilliard v. Kearney*, 1 Busb. Eq. (45 N. C., 1858), 221; *King v. King*, 15 Ohio, 561; *Durfee v. McNeil*, 58 Ohio St. 238, 50 N. E. R. 727; *Stump v. Findlay*, 2 Rawle (Pa.), 168; *Bailey v. Hawkins*, 18 R. I. 573; *Moon v. Herndon*, 4 Dea. Eq. (S. C.) 459; *Hayne v. Irvine*, 25 S. C. 289; *Franklin v. Franklin*, 91 Tenn. 119, 134, 18 S. W. R. 61; *Robinson v. Boyd*, 92 Tenn. 1, 39, 23 S. W. R. 72; *Gish v. Moomaw*, 89 Va. 345.

² *Howell v. Knight*, 100 N. C. 254, 6 S. E. R. 721.

vivor, means if either should die without leaving children.¹ So in a devise to the testator's three nieces and to the survivors of them, and, "if all shall die *without heirs*," then over to another; and if that devisee should die without issue, then over, the word "heirs" means children.² In some cases, where a provision that if the first taker shall die *without heirs* the estate shall go to another, has been construed, the word "heirs" is synonymous with issue, and the devise over will not take effect unless the first devisee shall die without issue living at his death.³

§ 618. When the word "heirs" means devisees or legatees. The word "heirs" is sometimes loosely used by the testator as synonymous in meaning with the words "legatees" or "devisees." An example of this occurs where the testator speaks of his heirs "*before or above mentioned*," meaning mentioned in the will. Thus, where the testator, having given legacies of stock in corporations to several persons, directed the executor to pay over the dividends on that stock to the "*heirs before mentioned*," it was held that the executor should pay the dividends over to all the legatees who received the stock.⁴ But, on the other hand, in the case of cumulative gifts to the "*heirs before mentioned*," those persons intended to be benefited, the

¹ *Baxter v. Winn*, 87 Ga. 239, 17 S. E. R. 634; *Dew v. Barnes*, 1 Jones' Eq. (N. C.) 149, 151.

² The court relied upon the facts that two of the nieces were unmarried, and that the testatrix had declared that she meant to benefit her relatives. *Haley v. Boston*, 108 Mass. 577, 579.

³ *Roberts v. Ogbourne*, 37 Ala. (1861), 178; *Gifford v. Choate*, 100 Mass. (1868), 345; *Benson v. Linthicum*, 75 Md. 141, 23 Atl. R. 133; *Waters v. Bishop*, 122 Ind. (1889), 516, 520; *Fisk v. Keene*, 35 Me. 349, 355; *In re Moore's Estate*, 33 N. Y. S. 419, 11 Misc. R. 436; *Moore v. Lewis*, 4 Ohio Cir. Ct. 284; *Knight v. Knight*, 3 Jones' Eq. (56 N. C., 1856), 169; *Newkirk v. Hawes*, 5 Jones' Eq. (56 N. C.) 267; *Gibson v. Gibson*, 4 Jones' L. (49 N. C.) 425; *Vaden v. Hance*, 1

Head (Tenn.), 300; *Ward v. Saunders*, 3 Sneed (Tenn.), 389. See cases cited *post*, § 845.

⁴ *Collier v. Collier*, 3 Ohio St. (1854), 369, 374; *Scudder v. Van Arsdale*, 12 N. J. Eq. 109, 113; *Estate of Schomps* (N. J., 1899), 42 Atl. R. 566. The distinction to be noted is between including under the phrase "heirs heretofore mentioned," all legatees and devisees, whether they are in fact heirs or strangers, and including only those persons who are mentioned in the will and who are *also* the heirs of the testator. It is very likely that the word "mentioned" by implication means *given a benefit*. An express mention of an heir in disinheriting him would hardly constitute such a mention of him as to bring him within the class of "heirs heretofore mentioned."

court said, were such legatees only before mentioned as would have been heirs of the testator if the will had not been made.¹ In this case the residue of the personal property was directed to be equally divided among "the whole of *my heirs named in this my last will*."² Where this distinction is recognized, the word "heirs," used in referring to another part of the will, will not, of course, include a corporation which is a legatee.³ So, too, a *legacy* "to my heirs *not heretofore named*" is to be paid to all the next of kin of the testator who are not beneficially named in the will.⁴ So where the testator gave property to his "legal heirs" (in the plural) "other than those hereinbefore named," it is not material that the only person who answered this description was the sole heir.⁵

§ 619. The word "heirs," in gifts of personal property, means next of kin.—In the case of a *gift of personal property*, made either to the heirs of the testator or to the heirs of another person, the question may arise whether the word "heirs" is employed as meaning those to whom land descends, which is its ordinary sense, or whether it is used to indicate those only who take the personal property in intestacy. Where personal property *alone* is bequeathed to the heirs, either of the testator or of another person, and the will itself does not show that the testator has employed the word in its technical sense, it may be presumed that the testator has used it to indicate the next of kin according to the statute who succeed to the personal property in case of intestacy.⁶

¹ *Ex parte Artz*, 9 Md. (1856), 65; *Porter's Appeal*, 15 Pa. St. (1850), 201.

² See also *Townsend v. Townsend*, 25 Ohio St. 477.

³ *Graham v. De Yampert*, 106 Ala. 279, 17 S. R. 355, 356.

⁴ *McCabe v. Spruil*, 1 Dev. Eq. (16 N. C.) 189.

⁵ *Minot v. Harris*, 132 Mass. 528, 531; and *cf.* *White v. Springett*, L. R. 4 Ch. 300. In *Rose v. Rose*, 17 Ves. 847, "*my heir under this will*" was held to refer to the residuary devisee and legatee. And where a testator gave all his land to his nephew, calling him "his heir male," and giving legacies to his daughters on condition

that they did not "trouble his heir," the devise was good though the nephew was not the heir male. *Pybus v. Mitford*, 1 Vent. 381. If the testator, having by his will disposed of *all* his property, directs his executor or his trustees to invest his property for the benefit of his heirs, he means for the benefit of his legatees and devisees whether they are also his heirs or not. *Macpherson v. Stewart*, 28 L. J. Ch. 177.

⁶ *Graham v. De Yampert*, 106 Ala. 279, 17 S. R. 355; *Eddings v. Long*, 10 Ala. (1846), 203, 206; *Rusing v. Rusing*, 25 Ind. (1865), 63; *Mace v. Cushman*, 45 Me. 250; *Morton v. Barrett*, 23 Me.

The construction of the word "heirs," in gifts of personal property, to mean "next of kin," is favored by the circumstance that the gift to *the heirs* is *substitutionary* in its character.¹ That is to say, if the testator, *in order to avoid a lapse*, after giving personalty to A., provides that, in the case of A.'s death before the death of the testator, the property shall go to A.'s heirs, the gift will be equivalent to a bequest to the next of kin of A. The evident intention of the testator, apparent from such a provision, is to benefit those persons only who would have taken the property if A. had survived the testator and taken an absolute interest and then died.² These persons are the statutory next of kin of A., for, if A. had survived the testator for only an instant, they and not his heirs would have taken the estate which came to him under the will.³

257, 264; *Bailey v. Bailey*, 25 Mich. (1872), 185, 190; *Sweet v. Dutton*, 109 Mass. 589, 591; *Houghton v. Kendall*, 7 Allen (89 Mass., 1868), 72, 75; *Loring v. Thorndike*, 5 Allen (Mass.), 257, 269; *White v. Stanfield*, 15 N. E. R. 919 (1888), 146 Mass. 424; *Hardy v. Gage*, 66 N. H. 552, 22 Atl. R. 557; *Scudder v. Van Arsdale*, 13 N. J. Eq. (1860), 109, 110; *Reen v. Wagner*, 51 N. J. Eq. 1, 26 Atl. R. 467; *Lawton v. Corlies*, 127 N. Y. 100, 106, 27 N. E. R. 847; *McCormick v. Burke*, 3 Dem. Sur. (N. Y.) 137; *In re Sinzheimer*, 5 id. 321; *Cushman v. Horton*, 59 N. Y. 149, 151; *Brothers v. Cartwright*, 2 Jones' (55 N. C.) Eq. 113, 116; *Corbit v. Corbit*, 1 Jones' Eq. (54 N. C., 1853), 114; *Henderson v. Henderson*, 1 Jones' (46 N. C.) L. 221; *Evans v. Godbold*, 6 Rich. Eq. (S. C.) 26, 35; *McCabe v. Spruill*, 1 Dev. Eq. (16 N. C., 1829), 489; *Stow v. Ward*, 2 Dev. Eq. 509; *Croom v. Herring*, 4 Hawks (11 N. C., 1826), 398; *Nelson v. Blue*, 63 N. C. 659; *Ferguson v. Stuart*, 14 Ohio St. 140; *Gibbons v. Fairlamb*, 26 Pa. St. 217; *Baskin's Appeal*, 3 Pa. St. 304; *Little's Appeal*, 117 Pa. St. 14, 11 Atl. R. 520; *In re Ashton*, 19 Atl. R. 699, 26 W. N. C. 41, 134 Pa. St. 390; *Purviance's Appeal*, 20 Atl. R. 397, 26 W.

N. C. 420; *Hunt's Appeal*, 19 Atl. R. 548, 25 W. N. C. 450; *Wood's Appeal*, 19 Atl. R. 550, 25 W. N. C. 454; *Thompson's Trusts*, L. R. 9 Ch. Div. 607.

¹ *Ante*, § 324 et seq.

² An illustration of a bequest of a substitutionary character to heirs designed to avoid a lapse is found in *Vaux v. Henderson*, 1 J. & W. 388, where a money legacy was given to a man, "and failing him by decease before me, *to his heirs*." A similar substitutionary gift was similarly construed in *Gettings v. McDermott*, 2 My. & K. 69. The intention of the testator was to prevent a lapse. "The argument was a very fair one, that as the property in one case would have gone to the party absolutely, and from him to his personal representatives, so when the testator spoke there by way of substitution, of the heir of the body, it was understood that he meant the same person who would have taken after him in case there had not been a lapse."

³ *Richardson v. Martin*, 55 N. H. 45; *Gardinshire v. Hinds*, 1 Head (38 Tenn.), 402; *Wright v. Church*, 1 Hoff. Ch. (N. Y., 1840), 212; *Hodges v. Phelps*, 65 Vt. 302; *Hascall v. Cox*, 49 Mich. 435, 441; *Jacobs v. Jacobs*, 2 K.

Very often a non-technical meaning is attached to the word "heirs," when it is employed in disposing of personal property, by a direction to divide a legacy, consisting of a sum of money among the heirs of a person other than the testator himself. Thus, where the testator directed that a sum of money should be divided among the heirs of his *late brother*, the court held that by *heirs* the testator meant next of kin. The court relied upon the fact that, as was apparent from the will, the testator knew the ancestor was dead, and that he also knew that he had left several children, only one of whom was the heir, while all were the next of kin.¹ Another circumstance indicating that the testator, in disposing of personal property to heirs, means his next of kin, is that he directs it to be paid to them, which is the sole mode in which the next of kin of a deceased person receive the shares of his estate to which they are entitled under the statute of distribution.² Thus, where the testator directed that a fund of personal property should be invested in trust "for the benefit of the heirs of the body of

& J. 729, 16 Beav. 557, 560; In re Porter, 4 K. & J. 188; In re Gamboa, 4 K. & J. 756; In re Philips, L. R. 7 Eq. 151; In re Newton, L. R. 4 Eq. 171; In re Craven, 23 Beav. 333, 335; Finlason v. Tatlock, L. R. 9 Eq. 257, 260; Wingfield v. Wingfield, L. R. 9 Ch. D. 658; Parsons v. Parsons, L. R. 8 Eq. 260; Vaux v. Henderson, 1 Jac. & Wal. 388, note; Gittings v. M'Dermott, 2 My. & K. 69; Stannard v. Burt, 52 L. J. Ch. 355, 48 L. T. 660; Doody v. Higgins, 9 Hare, 32, 2 K. & J. 729. This rule is applicable also where the substituted gift of personal property is to the heirs of the body. Pattenden v. Hobson, 22 L. J. Ch. 697, 17 Jurist, 406; In re Stevens, L. R. 15 Eq. 110, 114. In Newton's Trusts, L. R. 4 Eq. 171, where personal property was given "to the heirs and assigns of my sister A., *now deceased*," it was held that the gift was substitutional, and devolved upon the personal representative of A. for the benefit of her next of kin. In this case the court said on page 173: "The

original sense of the word is to prevail, and the person who is heir is to take as *persona designata*; and that notwithstanding the character of the property bequeathed. But here, the gift being to the 'heirs and assigns,' it is impossible for the heir to take as *persona designata*. And when it is found that in all the previous gifts the testator has used the words 'heirs and assigns' unnecessarily, the conclusion is that his notion was that this was the proper mode of limiting personal estate so that it should go in the ordinary course of distribution by law. Then, one of his relatives being already deceased, he intended to make a *quasi*-substitutional gift to those persons who might represent in law his deceased relative, precisely as he had given one-seventh already to each living relative, 'his (or her) heirs and assigns.'"

¹ In re Stevens' Trusts, L. R. 15 Eq. 110, 115.

² In Jeaffreson's Trusts, L. R. 2 Eq. 276, 282.

A., first to educate at their discretion the said heirs, and lastly to pay to the said heirs, at their respective ages of twenty-one, in such proportions as A. might by deed or will appoint," the next of kin took an estate by purchase, and the words employed did not give A. an absolute interest. So, too, particularly in England, where the principle of primogeniture prevails, a direction that a fund of personal property shall be *equally divided among the heirs of a person*, indicates almost conclusively that the next of kin are meant.¹

§ 620. **Gifts of personalty to the heir or heirs as *persona designata*.**—It should not be supposed, however, from the preceding discussion that it is impossible or illegal for a testator to bequeath personal property to his heir or heirs. A bequest of a *mixed residue of real and personal property*, as distinct from a gift of pure personalty, to the heir or to the heirs of the testator, will, as is subsequently pointed out, go to his heirs, technically speaking, and not to his next of kin. And as the word "heirs" will, primarily, be usually presumed to have been used in a technical sense, if the testator has given personal property to his heir or heirs, and there is no expression in the will to show that the testator meant his next of kin, the person or persons who are the heirs of the testator in the technical sense of the term are permitted to take the personal property. According to the English rules of descent, under which the principle of primogeniture is firmly established, a disposition of personal property *alone* to the *heir* or to the *heir at law* in the singular, is presumed to point out that person who is the heir, and he takes as a *persona designata*.² And a gift of personal property to the heirs or heirs at law, in the plural, or a gift of a mixed fund to such persons, particularly where a conversion of personal property into real property is directed by the will, goes to the heir at law.³ This restricted construction of the

¹ *Low v. James*, 25 L. J. 503, 2 Jur. (N. S.) 344, where the direction in the will was to convert real and personal property and to invest a share given therein for the benefit of a legatee until he should attain the age of thirty, when he was to receive half of it, to employ it in business, and upon his death the whole share to be equally divided among his heirs. See also *Ware v. Rowland*, where personal property was given to the heirs of a person share and share alike.

² *Gwynne v. Murdock*, 14 Ves. 488, 489; *Tetlow v. Ashton*, 20 L. J. Ch. 53, 15 Jur. 213.

³ *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524, 557, 562, 15 Sim. 163.

word "heir" to the person who is actually such is invoked not only in construing a gift of a mixed fund, but sometimes in the case of a gift of pure personal property. Particularly is this so where a gift of personal property is made to the heir *in the singular*.¹ So where there was a legacy of £4,000 expressly "*to my heir*," and the testator left him surviving three daughters, the court refused to depart from the ordinary sense of the term, viewing it as *nomen collectivum*, and the three co-heiresses had the legacy divided equally among them.² The converse of this proposition is equally true; for if the testator shall give personal property to his heirs, using the word in the plural, and he shall leave only one heir, that person will receive the legacy.³ The rules and principles which have just been stated are applicable in the United States, modified by the abolition of the rule of primogeniture, which is recognized by the common-law canons of descent in England. Doubtless the testator may dispose of his personal property to those persons who are technically his heirs, but, in view of the fact that in America the heirs and the next of kin of the testator under the statute are usually the same persons, the question has not arisen so frequently in America as it has in England, where the heirs and next of kin are different persons. So if a testator shall bequeath a legacy *to his heirs*, and shall leave him surviving two sons and two daughters, there can be no question who is to take, for each would take equally, whether the word "heirs" shall be construed in its primary or in its secondary sense. And in all cases where the word "heirs" is construed as meaning "next of kin" under the statute, the property will be distributed among the legatees *per stirpes*.⁴

§ 621. Personal and real property blended in a gift to the heirs.—The word "heirs," when it is used in a gift of the residue consisting of *real and personal property blended together*, and given either to the heirs of the testator or to the heirs of another, will be taken in its primary meaning, and the personal property will go, with the real property, to those who would

¹Smith v. Butcher, L. R. 10 Ch. D. 113; Danvers v. Lord Clarendon, 1 Vern. 35; Southgate v. Clinch, 27 L. J. Ch. 651, 1 Drew. & Sm. 228, 4 Jur. (N. S.) 428.

²Mounsey v. Blamire, 4 Russ. 384.

³Pleydell v. Pleydell, 1 Peere Wms. 748.

⁴Wood v. James, 115 N. Y. 346, 23 N. E. R. 346. And see cases cited in note 1, page 836, *contra*; In re Ashton, 26 W. N. C. 41, 19 Atl. R. 699.

take the latter by descent.¹ But if money is to be converted before going to the heir, the word is held to mean statutory next of kin.²

§ 622. Whether a husband or a wife is included in the word "heirs."—In the absence of a statute neither the husband nor the wife can be regarded as the heir of the other in any sense.³ In those cases where the courts have held that the widow of the testator was entitled to share under a provision for his heirs, or for his next of kin, it was so held because the statute entitled her to take as such if the testator had died intestate;⁴ or where in the will the testator had clearly indicated that he used the word "heirs," either as having the sense of devisees or legatees,⁵ as where he speaks of his "heirs before named,"⁶ one of whom is his widow; or where to exclude the widow of the testator from taking as of a class designated by the word "heirs" would be manifestly contrary to his clearly expressed intention.⁷

¹ *Clarke v. Cordis*, 4 Allen (86 Mass., 1862), 468, 480; *Lincoln v. Aldrich*, 149 Mass. 368, 21 N. E. R. 671; *Swaine v. Burton*, 15 Ves. 365. The circumstance that real property is combined with personal property in a gift to the heirs, though not conclusive that those who are technically heirs are to take as *persona designata*, furnishes a reason for such a construction which is not present when personal property alone is in question. *Wingfield v. Wingfield*, L. R. 9 Ch. D. 658. See also *Wright v. Atkyns*, 17 Ves. 365, where the gift was composed of a blended residue to a "family," which word was construed to be synonymous in meaning with "heir." *Gwynne v. Muddock*, 14 Ves. 488, 489 ("to my nighest heir at law to enjoy the same"); *De Beauvoir v. De Beauvoir*, 15 Sim. 163, 3 H. L. C. 524, 555, 562; *Proctor v. Clark*, 154 Mass. (1891), 45; *Lawrence v. Crane*, 158 Mass. 392.

² *Kendall v. Gleason*, 152 Mass. (1891), 457; *White v. Stanford*, 146 Mass. (1888), 424; *Lawrence v. Crane*, 158 Mass. 392. In *Tetlow v. Ashton*,

20 L. J. Ch. 53, 15 Jur. 213, where a blended fund was given "to the heir at law" of my family, the court said: "The testator has used words which no person, professional or unprofessional, can misunderstand. . . . If there were any correcting or explanatory context, the case might be different. I give no opinion how the case would have stood if the word 'heirs' had been used instead of 'heir.'" The next of kin cannot take.

³ *Dodge's Appeal*, 106 Pa. St. 216.

⁴ *Ferguson v. Stuart*, 14 Ohio (1846), 140; *Hascall v. Cox*, 49 Mich. (1882), 435; *Rotch v. Long*, 169 Mass. 190, 47 N. E. R. 660; *McLeod v. McDonnell*, 6 Ala. (1844), 236, 239; *Gibbons v. Gibbons*, 40 Ga. 562, 574. Where the statute makes the wife an heir, she is included in a gift to the testator's "heirs of the full blood." *Gibbons v. Gibbons*, 40 Ga. 562, 574.

⁵ *Ante*, § 618.

⁶ In the will. *Eisman v. Poindexter*, 52 Ind. 401.

⁷ *Lawrence v. Crane* (Mass., 1896), 33 N. E. R. 605.

The fact that the testator has made a substantial testamentary provision for his widow in lieu of dower, and then has devised all the residue to "*his heirs*," may raise a strong presumption that he does not intend she shall take as one of his heirs.¹ A devise to the heirs "*of the body of A.*,"² or a gift to the next of kin "*descended from A.*," excludes the wife or husband of A. by the express terms of the gift.³ In the state of New York, a devise to the heirs of M. "*in such shares as they would take if M. had inherited and died intestate,*" does not include M.'s widow;⁴ nor does a residuary devise to be divided among "*my (the testator's) heirs or next of kin as it would be by the laws of the state,*" include the widow of the testator.⁵ So in England a devise of real estate to the "*heirs of the testatrix*" does not include a husband who survives her.⁶

§ 623. **Whether heirs, when purchasers, take per stirpes or per capita.**—It is often difficult to determine in the case of a devise to the heirs of A., when they take as purchasers, whether they take under the will in the same proportions as they would take by descent, *i. e.*, *per stirpes*; or whether they are to take as living members of a class, *i. e.*, *per capita*. The intention of the testator, whenever it is expressly stated, is controlling. If he directs a division of property among his own heirs or the heirs of A. "*share and share alike,*" "*equally,*" "*in equal shares,*" "*parts*" or "*proportions,*" or used other words which indicate an equality of division, those persons who are to take as heirs will be indicated by the common-law or statutory rules of descent, though the proportion which each is to take must be determined by this expression of the testator's intention. They will take *per capita*.⁷ But it has been held

¹ Doody v. Higgins, 2 K. & J. 729, 9 Hare, 32; Lord v. Bowne, 25 Mich. 185, 188, 190; In re Peppitt, 36 L. T. (N. S.) 500; Welsh v. Crater, 32 N. J. Eq. 177.

² In re Jeaffreson's Trusts, L. R. 2 Eq. 276, 282.

³ Where the widow is by the statute entitled to take as one of the next of kin of her husband, she may claim under a gift of *personal property* to her husband's heirs. Ferguson v. Stuart, 14 Ohio, 140. See also Peacock v. Albin, 39 Ind. 25.

⁴ Murdock v. Ward, 67 N. Y. 887, followed in Platt v. Nickle, 32 N. E. R. 1070, 137 N. Y. 106, 33 N. E. R. 744.

⁵ Luce v. Dunham, 69 N. Y. 63; Cushman v. Horton, 59 N. Y. 151.

⁶ In re Walton's Trusts, 8 De Gex, M. & G. 174; Gardenshire v. Hinds, 1 Head (38 Tenn., 1858), 402; Peet v. Commerce & E. S. Ry. Co., 70 Tex. 522, 8 S. W. R. 203; Ivins' Estate, 106 Pa. St. 176.

⁷ De Laurencel v. De Boom, 67 Cal. (1885), 362; Kelley v. Vigas, 112 Ill. (1885), 242, 56 Am. R. 235; Best v.

that the heirs of the testator would take *per stirpes*, where he provided that his estate should be divided in equal shares to his heirs.¹ The direction to divide property equally among heirs or other legatees may be so far modified by a subsequent clause directing its division *per stirpes* that the provision for equality of division will be wholly nullified. But the presumption is always in favor of an equality of division.² Some difficulty may be experienced in determining the application of the words pointing out an equality of distribution or division. A provision for *A. and B. and the heirs of C. and D.*, to be divided "*equally among them*," is *ambiguous*, and the question arises, which can only be answered by construing the whole will, Does the testator mean to direct an equality of division among the *stirpes* or among the individuals?³ The rule of a division or partition *per capita*, indicated by a direction for an equal division, is not only applicable to a division among the heirs of *one person* mentioned by name, but is also applicable to the case of a division among the heirs of *two or more* persons, some of whom are dead, though the heirs may stand in different degrees of descent from their common ancestor. Those persons who, at the death of the testator, are the heirs of *each* of the several ancestors who are mentioned in the will, are regarded as constituting a separate class of devisees, irrespective of the fact that they are related more or less remotely to the common ancestor.⁴ So where a testator devised land, after a life estate given to his wife, in remainder to *his heirs and her heirs*, and at *her* death her heirs were sixteen in number, representing three

Farris, 21 Ill. App. 49; Follansbee v. Follansbee, 7 App. D. C. 282; Dukes v. Faulk, 87 S. C. 255, 16 S. E. R. 122; Barton v. Tuttle, 62 N. H. 558, 560; Bodine v. Brown, 42 N. Y. S. 202; Burgin v. Patten, 5 Jones' Eq. (N. C., 1860), 426; Ward v. Stow, 2 Dev. (N. C.) Eq. 509; Harris v. Philpot, 5 Ired. Eq. (40 N. C., 1848), 324, 328; Lemacks v. Glover, 1 Rich. Eq. (S. C.) 141; Allen v. Allen, 13 S. C. 512; Ortt's Appeal, 35 Pa. St. 267; Freeman v. Knight, 2 Ired. Eq. (37 N. C., 1842), 176; Tuttle v. Puitt, 68 N. C. 543; Ramsay v. Stephenson (Oreg.,

1899), 56 Pac. R. 520; Walker v. Webster, 95 Va. 277, 28 S. E. R. 570.

¹ In re Hock's Estate, 26 Atl. R. 610, 154 Pa. St. 417, 32 W. N. C. 276.

² Fields v. Fields, 93 Ky. 619, 20 S. W. R. 1042.

³ See In re Ashburner's Estate, 14 Pa. Co. Ct. R. 59, 2 Pa. Dist. R. 828, 23 W. N. C. 251; affirmed in 28 Atl. R. 361, 159 Pa. St. 545.

⁴ Hodges v. Phelps, 65 Vt. 302, 26 Atl. R. 625; Ward v. Stow, 2 Dev. Eq. (16 N. C., 1830), 509; Harris' Estate, 74 Pa. St. 452; Cogan v. McCabe, 52 N. Y. S. 48, 23 Misc. R. 739.

stocks, and his heirs then living were fourteen, representing four stocks, the heirs of both the testator and of his widow were taken together as one class, and the distribution was made among the thirty heirs *per capita*.¹ The fact that the testator mentions the various stocks or ancestors from which the heirs are derived respectively does not overcome the presumption of an equality of division arising from a direction to divide among heirs *share and share alike*.²

§ 624. When a distribution *per stirpes* is favored.—In very many cases, where the will is silent as to the mode of division, heirs will take as a class *per stirpes*. This is usually the case where the ancestor is deceased, and the word “heirs” is used by the testator in its primary and technical sense. This rule is always recognized in the case of a devise to the heirs of the testator, in the absence of an express direction requiring an equality of division,³ and sometimes even where there is such a direction.⁴ Thus, in a case decided in Massachusetts,⁵ the testator ordered that the residue of his estate should “be equally divided among those persons who shall be my legal heirs at the time of my decease; and, in the distribution, I direct that the children of my sisters A. and B. shall share the same equally numerically.” The testator had one sister A., who was alive and had seven children, and another sister B., who was deceased, leaving two children. The court directed a division among the heirs *per stirpes*. The living sister of the testator took one-half, and the children of the deceased sister the other half equally between them. The presumption is al-

¹ *Bisson v. West Shore R. Co.*, 38 N. E. R. 104, 143 N. Y., 125.

² *In re Scott's Estate* (Pa. Supp.), 29 Atl. R. 877, 163 Pa. St. 165, 35 W. N. C. 403.

³ *Houghton v. Kendall*, 7 Allen (89 Mass., 1863), 72, 77; *Rand v. Sanger*, 115 Mass. 124, 128; *Eyer v. Beck*, 70 Mich. 179, 38 N. W. R. 20; *Lott v. Thompson*, 36 S. C. (1891), 38, 15 S. E. R. 278; *Ruggles v. Randall*, 70 Conn. 44, 38 Atl. R. 885; *Jackson v. Alsop*, 84 Atl. R. 1106, 67 Conn. 249; *Thomas v. Miller*, 161 Ill. 60, 43 N. E. R. 848; *Alston's Appeal* (Pa., 1887), 11 Atl. R.

366. Where a testator leaves his estate to his two brothers for life, with remainder to be “divided between my heirs at law,” the heirs, consisting of children and grandchildren of deceased brothers and sisters, take *per stirpes*, and not *per capita*. *Johnson v. Bodine* (Iowa, 1899), 79 N. W. R. 348.

⁴ *In re Swinburne*, 16 R. L. 208, 14 Atl. R. 850; *Alston's Appeal* (Pa., 1887), 11 Atl. R. 366; *Kellerman v. Vigas*, 112 Ill. 242.

⁵ *Rand v. Sanger*, 115 Mass. 124, 128.

ways in favor of a division *per stirpes*, if the gift is to the *heirs of two or more persons*, or to *two persons and the heirs of others*, and any of these ancestors are living at the date of the distribution. A gift *to the heirs of A. and to the heirs of B.* shows on its face a clear intention to make an equal division between the heirs who are descended from each ancestor whose name is mentioned. In such a case, or in the case of a devise to A., who is a living person, and also to the heirs of B., who is deceased, a fund or property will be divided into as many shares as there are ancestors named, and the heirs of those who are dead will take among themselves the share which represents their ancestor, *per stirpes*.¹

So, where land was to be divided among the heirs of A. and the heirs of B. after the death of the wife of the testator, the heirs of A. and B. living at that date, irrespective of their stocks, will take the land *per stirpes*; and this presumption is favored by the fact that the testator had given life estates respectively to the ancestors who are named, with a remainder to their respective heirs.² A similar rule requiring a division *per stirpes* may be invoked where the property is devised to be divided among the children of the testator *or* their heirs;³ or between the widow of the testator and the heirs of his mother;⁴ between the heirs of A. and the heirs of my brother and sister;⁵ to the heirs of "*my late*" husband and my own heirs equally;⁶ to A., B. and C. and the heirs of D. equally;⁷ to the legal heirs of the testator, excepting his son, who is specifically named;⁸ to A. and B. for life, respectively, and, on

¹ Thus, in the case of a gift of money, to be divided between A. and the heirs of B. at the death of the testator, and A. is living, he will take one-half, and the other half will be divided *per capita* amongst the heirs of B., provided they are descended from B. in the same degree, but *per stirpes* if descended in different degrees. *Hoxton v. Griffiths*, 18 Gratt. (Va.) 574; *Roome v. Counter*, 6 N. J. Law, 111.

² *Preston v. Brant*, 10 S. W. R. 78, 8 Mo. 552.

³ *Britton v. Johnson*, 2 Hill (S. C.,

1834), L. 430; *Taylor v. Fauver* (Va., 1897), 28 S. E. R. 317; *Miller's Appeal*, 32 Pa. St. (1859), 323.

⁴ *Perkins v. Stearns*, 163 Mass. 247, 39 N. E. R. 1016.

⁵ *Holbrook v. Harrington* (82 Mass., 1860), 16 Gray, 102, 104; *Burgin v. Patten*, 5 Jones' (N. C.) Eq. 426.

⁶ *Ross v. Kiger*, 42 W. Va. 402, 410, 26 S. E. R. 193.

⁷ *Ricks v. Williams*, 1 Dev. Eq. (N. C.) 1; *Balcom v. Haynes*, 14 Allen (96 Mass., 1867), 204, 205.

⁸ *Rand v. Sanger*, 115 Mass. (1874), 124, 128.

the death of either of them, his or her share to be divided among his or her heirs.¹

§ 625. **Statutory modification of the laws of descent.**—The interest or estate which a devisee takes under the will, if it is immediate and vested, and if he answers to the description of an heir, at the death of the testator, is vested in him *at and by the death of the testator*, and his title is merely confirmed and strengthened by probate of the will. Hence, as a vested right or interest, his title is entirely beyond legislative control, and may not be diminished or abrogated or in any wise impaired by statutory enactment. For this reason no subsequent change in the law of descent which is the result of statutory enactment will prevent those persons who, at the date of the death of the testator, answer to the description of heirs, from taking their estates, where the devise vests immediately. And where at the time of the death of the testator his wife is not an heir according to the then existing statute, she will not take as such, though by a subsequent statute she is made an heir.²

§ 626. **Next of kin simpliciter includes only nearest blood relations.**—Much divergence of opinion existed in the early cases as to the construction of the words “next of kin.” If the testator, in a gift to the next of kin, refers expressly or by implication to the statute of distribution, he will be conclusively presumed to mean, by next of kin, those persons only who take personal property under that statute. On the other hand, where the gift is *simply* to the next of kin, without any reference to the statute, the rule now is that the testator means his *nearest*

¹ King v. Savage, 121 Mass. (1876), 303, 306; Daggett v. Slack, 8 Met. (Mass.) 450, 453; Tillinghast v. Cook, 9 Met. (Mass.) 143, 147; Forrest v. Porch, 45 S. W. R. 671, 100 Tenn. 391; Bassett v. Granger, 100 Mass. (1868), 348, 349. In a case where the word “heirs” is used as an equivalent of next of kin in a gift of personal property, the next of kin will take *per stirpes*, according to the statute of distribution. Woodward v. James, 22 N. E. R. 150 (1889), 115 N. Y. 43, 46. But see *contra*, In re Ashton, 19 Atl. R. 699, 26 W. N. C. 41 (1890), 134 Pa. St. 390. A devise of half of the estate

of the testator to “his heirs” Z. and R., and the remaining half to the “heirs of T.” and her deceased husband, namely, “M., S. and D.,” requires a division *per stirpes*, and on only one of the heirs of the husband who were named having survived the testator, he took all. Swallow v. Swallow (Mass., 1896), 44 N. E. R. 132.

² In re Swenson’s Estate, 55 Minn. 300, 56 N. W. R. 1115; Lincoln v. Aldrich, 21 N. E. R. 671, 149 Mass. 368. So also Wood’s Appeal, 18 Pa. St. 478; Aspden’s Estate, 2 Wall. Jr. C. C. 368.

relations. He means those persons who are most nearly related to him by consanguinity.¹ Thus, suppose a testator shall leave him surviving two brothers, and the children of another brother who is deceased. The question arises, who are to take under these circumstances as next of kin? The rule of the civil law is employed in determining who are the next of kin, and this law traces descent from the testator as the *propositus*, and not from the common ancestor.² The brothers are equally related to the testator in the first degree, the nephews and nieces in the second; and the former take as nearest of kin, where no reference is made to the statute, while the latter are excluded.³

Where several persons answer to the description "next of kin," and are related to the testator or other *propositus* in equal degrees, they take, at common law, as joint tenants. This was so decided where a gift to the next of kin was construed to go

¹ See, generally, 5 L. R. A. 690, 15 L. R. A. 300.

² *Cooper v. Denison*, 13 Sim. 290.

³ *Swasey v. Jacques*, 144 Mass. 137, 138, 4 N. E. R. 135; *Harraden v. Larrabee*, 118 Mass. 431; *Leonard v. Haworth* (Mass., 1898), 15 N. E. R. 7; *Wetter v. Walker*, 62 Ga. 145; *Fargo v. Miller*, 22 N. E. R. 1003, 150 Mass. 225; *Keniston v. Mayhew*, 169 Mass. 166, 47 N. E. R. 612; *Jones v. Oliver*, 3 Ired. Eq. 369, 371; *Simmons v. Gooding*, 5 Ired. Eq. (40 N. C., 1848), 382, 390; *Richmond v. Burroughs*, 63 N. C. (1869), 242, 245, 646; *Harrison v. Ward*, 5 Jones' Eq. (N. C.) 236, 240. The English cases in which the term "next of kin" was construed to mean statutory next of kin are *Phillips v. Garth*, 3 Bro. C. C. 64; *Stamp v. Cooke*, 1 Cox Ch. R. 234; *Hinckley v. Maclarens*, 1 My. & K. 27, 31. The question usually arose between the living brothers and sisters of the testator and the children of brothers and sisters who were deceased. The statute 22 and 23 Car. II, ch. 10, and 29 Car. II, ch. 30, gave the children of a deceased brother or sister of an intestate the right to take personal property by representa-

tion. In *Elmsley v. Young*, 2 Mylne & K. 82, 870, a trust was created for the benefit of such persons who should be the next of kin of A. at his death. It was claimed by a brother and a nephew of A. The court, excluding the nephew, gave the whole fund to the brother. This construction has been followed in *Withy v. Mangles*, 4 Beav. 358, 10 Cl. & Fin. 215, 8 Jurist, 69; *Baker v. Gibson*, 12 Beav. 101; *Dugdale v. Dugdale*, 11 Beav. 402; *Garrick v. Lord Camden*, 14 Ves. 372; *Smith v. Campbell*, *George Cooper*, 275; *Lucas v. Brandreth*, 28 Beav. 274, 278; *In re McVicar*, 17 W. R. 832, L. R. 1 P. & D. 671, 673; *Boys v. Bradley*, 10 Hare, 389, 396; *Halton v. Foster*, L. R. 3 Ch. 505, 507, 16 W. R. 645, 683; *Avison v. Simpson*, Joh. 43, 7 W. R. 277; *Wimbles v. Pitcher* (1806), 12 Ves. 433 (where a gift to "next of kin in equal degree" was construed to exclude representatives claiming under the statute). See, also sustaining the general rule of construction, *Richardson v. Richardson*, 14 Sim. 520, 644; *Brandon v. Brandon*, 3 Sw. 312, 318, 2 My. & K. 82; *Harris v. Newton*, 25 W. R. 228, 36 L. T. (N. S.) 173, 46 L. J. Ch. D. 268.

to the father and the children of the testator, who were his next of kin at the civil law.¹ As a consequence of this rule of construction, by which the term "next of kin" *simpliciter* is not regarded as synonymous with distributees under the statute of distribution, all who are equally related to a common *propositus* will take, though *some* of them could not take under the statute. Thus, where the testamentary provision is for the next of kin *simply*, and the *propositus* has died leaving a father, a mother and also a child, all of whom are of course related to him in equal degrees of consanguinity, they will share equally; though, under the statute, the child would have taken all as a sole distributee.²

§ 627. Construction of the words "next of kin" when the statute of distribution is referred to.—The effect of a gift to the next of kin *simpliciter*, and a gift to the next of kin with some reference to the statute of distribution, is very different. In the former case, as we have seen,³ those who are related by blood in *equal degrees take* to the exclusion of those who claim solely by representation; but in the latter case it is well settled that all those take who would *take personal property under*

¹ Withy v. Mangles, 4 Beav. 358, 10 Cl. & Fin. 215, 8 Jurist, 69. In New York and New Hampshire the English rule that a gift to next of kin *simpliciter* means the nearest of blood, and not distributees, has been repudiated. Slosson v. Lynch, 28 How. Pr. (N. Y., 1864), 417; Murdock v. Ward, 67 N. Y. (1876), 387, 391; Keteltas v. Keteltas, 72 N. Y. (1878), 312; Tillman v. Sullivan, 63 How. Pr. (N. Y.) 361, 95 N. Y. 27; Pinkham v. Blair, 57 N. H. 226, 244; Varrell v. Wendell, 20 N. H. 431.

² Withy v. Mangles, 4 Beav. 358. In this case the court said: "All writers on the law of England appear to concur in stating that, in an ascending and descending line, the parents and children are in equal degree of kindred to the proposed person; and I think that, except for the purposes of administration and distribution in cases of intestacy, and

except in cases where the simple expression may be controlled by the context, the law of England does consider them to be in an equal degree of consanguinity. The law of England gives a preference to the child over the parent in distribution; but I think we cannot therefore conclude, with respect to every distribution of property, made in the words 'to give the same to persons equally next of kin,' the parents are to be held more remote than the child." As the relationship is determined by the rules of the civil law, relatives of the half-blood are next of kin to the same extent as those of full blood. Thus, all a man's brothers and sisters are his next of kin, though they may not have had the same parents. Cotton v. Schrancke, 1 Maddock (1815), 45; Grieves v. Rawley, 10 Hare, 63.

³ Ante, § 626.

the statute of distribution in case of an intestacy. This may include some persons who would take as blood relations and exclude others. It is sometimes important to determine what words shall constitute a reference to the statute. It has been held that where the testator speaks of his next of kin as "if he had died intestate," or as "in case of intestacy," or according "to the statute of distribution," he means the next of kin under the statute. Where he thus describes them, and does not at the same time expressly indicate that they are to take in equal shares, the reference to the statute will not only determine *who* are to take, but *how* and in *what proportions* they are to take. In such event the statutory next of kin will take as in intestacy; that is, *per stirpes*, by representation and as tenants in common.¹

If there is no reference to the statute, the next of kin will take as joint tenants.² Where an equal division among statutory next of kin is *expressly* directed, they will take *per capita*, and not *per stirpes* as under the statute.³ If the gift is to the next of kin according to the statute, *equally* in shares, the persons answering that description will take *per capita*.⁴

¹In *re Thompson's Trust*, L. R. 9 Ch. D. 607; *Jacobs v. Jacobs*, 16 Beav. 557, 560; *Lewis v. Morris*, 19 Beav. 34, 37; *Ranking's Settlement*, L. R. 6 Eq. 601; *Mattison v. Tanfield*, 3 Beav. 131, 132; *Markham v. Ivatt*, 20 Beav. 579; *Watt v. Watt*, 3 Ves. 244; *Bailey v. Wright*, 18 Ves. 49; *Hinckley v. MacLarens*, 1 Mylne & K. 27, 31; *White v. Springett*, L. R. 4 Ch. 300; *Houghton v. Kendall*, 7 Allen (Mass.), 72, 77; *Horn v. Coleman*, 1 Smale & Gif. 169; *Martin v. Glover*, 1 Collyer, 269, 272; *Booth v. Vicars*, 1 Coll. 6; *Phillips v. Garth*, 3 Bro. C. C. 64; *Cooper v. Cannon*, 1 Phil. Eq. (N. C., 1867), 83, 84; *Jones v. Oliver*, 3 Ired. Eq. (38 N. C., 1844), 369, 371; *Rock v. Attorney-General*, 31 Beav. 313 (1862); *Redmond v. Burroughs*, 63 N. C. 242, 245; *Simmons v. Gooding*, 5 Ired. Eq. (40 N. C.) 382, 390.

²*Walker v. Marquis of Camden*, 16 Sim. 329.

³*Scudder v. Van Arsdale*, 12 N. J. Eq. 109, 113; *Thomas v. Hole*, Cas.

Temp. Tal. 251; *Butler v. Stratton*, 3 Bro. C. C. 367; *Blackler v. Webb*, 2 P. Wms. 383. See *ante*, §§ 623, 624.

⁴*Mattison v. Tanfield*, 3 Beav. 131, 132, 133. A mere reference to legal next of kin is not a reference to next of kin according to the statute. "Legal next of kin" means next of kin lawfully born. *Harris v. Newton*, 25 W. R. 228, 229, 37 L. T. (N. S.) 173, 44 L. J. Ch. D. 268. The circumstance that a gift to statutory next of kin is to them as tenants in common does not alone entitle them to take *per capita*. *Mattison v. Tanfield*, 3 Beav. 131, 132; *Lewis v. Morris*, 19 Beav. 34, 37. *Contra*, *Richardson v. Richardson*, 14 Sim. 526. A limitation to the next of kin of A., who is a married woman, after her death "as if she had died intestate and unmarried," means as if she had died *without leaving a husband*; for if a testator meant by "unmarried" never having been married, a child of a woman who was married and sur-

§ 628. Next of kin specifically described as of a particular name or sex — Gifts to worthy next of kin.— The testator may expressly prefer his next of kin of any particular class, provided the class of persons who are to be favored is not so vaguely and indefinitely described that the gift is void for the uncertainty of the beneficiaries. A provision for the next of kin who are “*in need of assistance*,” or who are necessitous, with a power of selection, would undoubtedly be valid.¹ But a gift to the next of kin of A. who are *worthy*, or *according to their deserts*, would certainly be invalid for the uncertainty of the persons intended.² Gifts to male next of kin have been sustained. But a person who happens to be included in the terms of a devise to next of kin *ex parte materna* is not deprived of his gift merely because he happens to be next of kin *ex parte paterna* also.³ Where a gift was made to the testator’s “next of kin by the surname of Crump, living at the death of A.,” it was held that the legatees need not answer to *both requisites*; but that a lady by the name of Carpenter, whose maiden name was Crump, and who was the sole next of kin at A.’s death, should take. The court regarded the qualification of the surname as equivalent to the stock or family of Crump.⁴ The term “nearest

vived her husband would be excluded from the class of her next of kin. Day v. Barnard, 1 Dr. & Sm. 351; Halton v. Foster, L. R. 3 Ch. App. 505; Clarke v. Colls, 9 H. L. Cases, 651; In re Webber, 17 Sim. 221. The statutes 22 and 23 Car. II, c. 30, 29 Car. II, c. 30, provided that the estate of an intestate shall go one-third to his widow and the balance equally to his children, or, if dead, to their representatives, i. e., their descendants; if no children, then one-half to the widow and the other to the next of kin in equal degrees; if no widow, then all to the children equally; if no widow or children, then among the next of kin in equal degrees or their representatives, but no representation is allowed among collaterals farther than the children of the brothers and sisters of the intestate.

¹ See §§ 592, 593.

² Frazier v. Frazier, 2 Leigh (Va.) 642, 644.

³ Say v. Creed, 5 Hare, 580; Gundry v. Pinniger (1851), 14 Beav. 94, 99, 1 De Gex, Mac. & G. 502.

⁴ Carpenter v. Bott, 15 Sim. 609. See also Pyot v. Pyot, 1 Ves. 335; Leigh v. Leigh, 15 Ves. 92; Doe v. Plumptre, 3 Barn. & Ald. 474; *ante*, § 605. In Boys v. Bradley, 10 Hare, 389, 414, 4 D. M. & Cr. 58, 5 H. L. Cas. 878, 892, 900, 25 L. J. Ch. 598, a very peculiar question arose. A devise was “to the then nearest kin in the male line *in preference* to the female line,” after a term of twenty-one years for accumulation. The testator died a bachelor, leaving one sister and several nephews who were the sons of a deceased sister, and also a remote male relation. He provided that the legatee should take the name of Sayers. The court held, *first*, that

of kin of my paternal line" includes all the descendants of the ancestor; that is, the brother as well as the grand-children of the testator.¹ A direction to distribute money among the next of kin of the testator on the father and mother's side requires a distribution among all the next of kin *per capita*, and does not justify a division into two funds and a distribution *per stirpes*.² A provision for the heirs or next of kin of A., but *in no case to go to B.*, where B. is, at the death of A., his sole heir or sole next of kin, is susceptible of two constructions. On the one hand the legacy may be void for contradiction and uncertainty, for it is equivalent to a gift to a class with a provision that revokes the class gift if B. is the sole member of the class. Or it may be construed as a gift to the heirs or next of kin of A., provided B. had predeceased A. The latter construction would probably be preferred to avoid an intestacy.³

§ 629. When the next of kin as a class are to be ascertained in case of an immediate gift.— So far as the ascertainment of the class which is designated by the term "next of kin" is concerned, two lines of cases are to be found. The first class of cases comprises those in which the devise is to the next of kin *of the testator*; the other class of cases comprises those in which the devise is to the next of kin of *some other person* than the testator. Where the bequest is to the next of kin of the testator, the question arises whether those are to take as next of kin who answer to that description at the date of his death, or whether those persons are to take as next of kin who would answer that description had he died at some future period. In all cases of immediate gifts to the testator's next of kin, *i. e.*, where the title is to vest at the death of the testator, it is the rule that those persons who are his next of kin at his death take a vested interest, though their possession is postponed

the words "nearest of kin in the male line" did not mean the nearest of kin *being* a male or males, exclusive of females, but excluded only those who took in the female line; second, it was not necessary that the person who was to take should have derived his title as next of kin *exclusively* through a line of males. The expression simply meant the

nearest relation *ex parte paterna, i. e.*, some descendant from the father of the testator, not from his mother. As the sister of the testator answered this description precisely, she was permitted to take.

¹ Cooper v. Denison, 13 Sim. 290.

² Dugdale v. Dugdale, 11 Beav. 402.

³ White v. Springett, L. R. 4 Ch. 300.

until after the expiration of a life estate in some other person.¹ Thus, where the testator directs his property to be divided in remainder, after the death of his wife, among his next of kin² and the next of kin of his wife,³ where he bequeaths a remainder in his residuary estate after the death of his wife to such persons as would be entitled to succeed to the same in case he has died intestate,⁴ or where, after a gift to a person in fee, and, if she died without issue, then the property is to go to his own relations,⁵ it was held that such persons as would answer to the description of next of kin or relations at the *time of his death* took a vested remainder at that date. So a gift in remainder to my son A. when he shall attain his majority, but if he die under twenty-one then "to such persons as shall be my next of kin according to the statute," creates a vested remainder in the son, who is the sole next of kin of the testator at his death, and this remainder goes, on the death of the son under majority, to his heirs.⁶

§ 630. When ascertainable as a class if vesting is postponed.—The power of the testator to attach a meaning to the words "next of kin" by proper language that will include those persons *only, who would be his next of kin if he should die intestate at some future period*, is undoubted. Thus, where the provision in effect postpones the vesting until a future period, when the property is to vest among the next of kin of the testator, those persons will take as legatees who would have been his next of kin had he died at the date of the vesting, and the persons who are *then* capable of taking as the testator's next of kin are the proper and lawful claimants, irrespective of the fact that at the death of the testator they were not his next of kin.⁷

¹ Keniston v. Mayhew, 47 N. E. R. 612; Harrison v. Harrison, 28 Beav. 21; Harrington v. Harte, 1 Cox Ch. 131; Mortimer v. Slater, 37 L. T. 520, 26 N. W. R. 134; Rayner v. Mowbray, 3 Bro. C. C. 234; Masters v. Hooper, 4 Bro. C. C. 207; Garner v. Lawson, 3 East, 278, 290; Lang's Will, 9 W. R. 589; Mitchell v. Bridges, 13 W. R. 200; Philips v. Evans, 4 De Gex & Smale, 188; Lee v. Lee, 1 Dr. & Sm. 85.

² Jones v. Knappen, 63 Vt. 391, 22 Atl. R. 630.

³ Jones v. Oliver, 3 Ired. (N. C.) Eq. 369, 371.

⁴ Smith v. Allen, 53 N. Y. S. 114.

⁵ Lee v. Massey, 3 De Gex, F. & J. 113.

⁶ Harrison v. Harrison, 28 Beav. 21.

⁷ Pinder v. Pinder, 28 Beav. 44; Chalmers v. North, 28 Beav. 175; Boys v. Bradley, 10 Hare, 389, 413; Bessant v. Noble, 27 L. J. Ch. 236;

§ 631. Ascertainment of the class where a life estate is given to one of the next of kin.—A distinction has been made by some of the decisions where the devise is to the next of kin of the testator, to be distributed among them in remainder after a life estate in a person who is himself, *at the death* of the testator, *one of the next of kin*, though not at that time his *sole* next of kin. The question here arises, does not the testator, by giving a life estate to a person who is at his death *one of his next of kin*, by implication postpone the date for ascertaining the class of next of kin who are to be the legatees? For it follows that if *all* the next of kin of the testator living at his death are to take a vested remainder, the life tenant will not only take a vested life estate, but he will also take a vested share in fee in remainder as well; and on the contrary, it has been suggested that the testator, by giving him a life interest in express terms, intended that he should by implication be excluded from all participation in the remainder. However this may be, the general rule that the class of next of kin is to be ascertained at the testator's death is undoubtedly applicable to such a case.¹ So, also, the general rule that the next of kin of the testator are to be ascertained as of his death is undoubtedly applicable to the case of a remainder to his next of kin, coming after the death of a life tenant, who is, himself, at the death of the testator, his *sole* next of kin. In one or two early cases the circumstance that the life tenant was the sole next of kin of the testator at his death has been considered sufficient to exclude the life tenant from participating in a provision for the next of kin of the testator at the termination of the life tenancy.² It will be found, however, on investigation that the majority of cases are in favor of applying the general rule which ascertains the members of the class of the next of kin

Horn v. Coleman, 1 Sm. & Gif. 169; & J. 483; Starr v. Newberry, 23 Long v. Blackall, 3 Ves. 486. Beav. 436, 438; Gundry v. Pinniger, 14

¹ Lasbury v. Newport, 9 Beav. 376; Beav. 94, 99; Bradley v. Barlow, 5 Holloway v. Radcliffe, 23 Beav. 163; Hare, 589, 594; In re Rees, L. R. 44 Jenkins v. Gower, 2 Coll. 537; Doe d. Ch. Div. 484; In re Ford, 72 L. T. 5; Garner v. Lawson, 8 East, 278, 290; Cable v. Cable, 16 Beav. 507, 509; Masters v. Hooper, 4 Bro. C. C. 207; ante, § 611.

Harrington v. Harte, 1 Cox, Ch. R. ² Jones v. Colbeck, 8 Ves. 38; Briden 131; Holloway v. Holloway, 5 Ves. v. Hewlett, 2 My. & K. 90; Butler v. 399, 401; Wharton v. Barker, 4 Kay Bushnell, 3 My. & Cr. 232.

as of the death of the testator, even when the life tenant is himself the sole next of kin at the testator's death.¹ An express provision that the property shall go to such persons as shall, after a life estate, *then* be considered as "*my next of kin according to statute*," and shall *then* be considered the next of kin of "*my deceased wife*," by the effect of the word "*then*," means those who are the next of kin of the testator and of his wife in case they had died immediately at the termination of the life estate.² The fact that a direction is inserted that upon the death, unmarried, under majority, or without issue, of a person to whom property is devised, the said property is to go to the next of kin of the testator according to the statute, where the primary taker is *one* of the next of kin at the death of the testator, indicates very strongly that the testator means those persons who would be his next of kin if he had died immediately after the death of the primary taker. Under such a condition of affairs it is very improbable that the testator intended that person to take as one of his next of kin upon whose death without issue he has expressly directed the property should go to others.³

§ 632. **Immediate gifts to the next of kin of other persons than the testator.**—A gift to the next of kin of A., which is to vest in them at the death of the testator, may be either to the next of kin of a person who is dead at the date of the will, or at the death of the testator, or to a person who is living at the death of the testator. Where the gift is to the next of kin of a person who has died before the date of the will, or after that and before the death of the testator, it means the next of kin of that person living at *his* death, who *also survive the testator*.⁴ In a case where the gift is to the next of kin of a per-

¹ Say v. Creed, 5 Hare, 580, 587; Jenkins v. Gower, 2 Coll. 537; Pearce v. Vincent, 1 Cr. & M. 598, 2 My. & Cr. 800; Seifferth v. Badham, 9 Beav. 370, 374, 10 Jur. 892; Elmsley v. Young, 2 My. & K. 82, 780; Miller v. Eaton, Sir G. Coop. 272; Minter v. Wraith, 13 Sim. 52, 63; Booth v. Vicars, 1 Coll. 6, 12; Bullock v. Downes, 9 H. L. C. 1, 18; Fargo v. Miller, 150 Mass. 225 (1889), 5 L. R. A. 690, 692; Minot v. Tappan, 122 Mass. (1877), 536;

Dove v. Tore, 128 Mass. (1880), 38; Minot v. Harris, 132 Mass. 328; Whall v. Converse, 146 Mass. 345, 5 N. E. R. 823; Pinkham v. Blair, 57 N. H. 227, 242. *Contra*, Leonard v. Haworth (Mass., 1898), 51 N. E. R. 7.

² Wharton v. Barker, 4 K. & J. 483.

³ Butler v. Bushnell, 3 My. & K. 232.

⁴ Hobgen v. Neale, L. R. 11 Eq. 48; Vaux v. Henderson, 1 Jac. & Wal. 388.

son who is living at the death of the testator, it will not vest in those persons who would be next of kin if he should die immediately after the testator, but in those who may be such at his death, whenever that event may take place. And this is the case even though the distribution may be expressly postponed until long subsequent to the death of the person whose next of kin are to benefit.¹

§ 633. Presumption that testator means legitimate next of kin.— Where a testator uses the words “next of kin,” whether with or without a reference to the statute, it will be presumed that he means those who are legitimately such.² Thus, where he gives money to his illegitimate child by name, with a remainder to his own next of kin under the statute, who were his brothers and sisters, and who were also illegitimate, the latter did not take.³ But where the testator, in making provision for statutory next of kin, expressly provides that A. shall, for the purposes of his will, be deemed the lawful child of B., A., though an illegitimate daughter of B., is entitled to take as one of the next of kin of B.⁴

¹ *Danvers v. Earl of Clarendon*, 1 Vern. 35; *Cruwys v. Coleman*, 9 Ves. 819; *Gundry v. Pinniger*, 14 Beav. 94, 99, 1 De Gex, Mac. & G. 502; *Smith v. Palmer*, 7 Hare, 225; *Walker v. Marquis of Camden*, 16 Sim. 329. And where the gift is to a person for his life, with a remainder in fee to the next of kin of that person, the expectant next of kin living at the

death of the testator will take vested interests in remainder. *Stert v. Platel*, 5 Bing. N. C. 434.

² *Harraden v. Larrabee*, 113 Mass. 430, 431; *In re Turner's Estate*, 5 Pa. Dist. Court, 360.

³ *Standley's Estate*, L. R. 5 Eq. 303, 310.

⁴ *Wilson v. Atkinson*, 4 De Gex, J. & S. 455.

CHAPTER XXXI.

GIFTS TO PERSONAL REPRESENTATIVES AND EXECUTORS AS PURCHASERS AND BY REPRESENTATION.

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| <p>§ 634. The primary meaning of the words "legal" or "personal representatives."</p> <p>635. Legal or personal representatives may mean "next of kin."</p> <p>636. Expressions favoring the next of kin as personal representatives — Division <i>per stirpes</i> or <i>per capita</i>.</p> <p>637. Mode of distribution among personal representatives.</p> <p>638. Gifts of real property to legal or personal representatives.</p> | <p>§ 639. When executors and administrators take by limitation, and not as purchasers.</p> <p>640. Whether an executor takes in trust or beneficially.</p> <p>641. Language which may indicate that the executor is to take in trust.</p> <p>642. Bequests to executors for their own benefit.</p> <p>643. Beneficial gifts to executors or trustees by name — When conditional upon the acceptance of the office.</p> |
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§ 634. The primary meaning of the words "legal" or "personal representatives." — The ordinary meaning of the words "legal representative" or "personal representative" is "executor" or "administrator," *i. e.*, one who represents the deceased as to his personal property. Usually these words are words of limitation, creating an absolute interest in the deceased person. The executor represents the estate of his testator more actually, says Lord Coke,¹ than the heir represents his ancestor.

The addition of the word "personal" to the word "representative" does not favor the meaning "next of kin," as that word implies only that the representative has to do exclusively with the personal estate of the decedent whom he represents, while the term "legal" signifies that he is recognized by the law, and does not extend the meaning of the word. And, on the other hand, the next of kin can hardly claim to represent the testator as kindred of his blood, for the class of next of kin, as indicated by the statute of distribution, includes persons related to the deceased in different degrees of blood relationship.

¹ Co. Litt. 209a.

and *may include the wife, who is not a relation by blood at all*. Nor have the creditors any claim against the next of kin as representatives of the deceased, for they must resort to his executor or administrator.

For these reasons the words "legal representatives" will, in the absence of anything in the context to indicate that they have a different signification, be presumed to mean executors or administrators, and it will require more than merely slight indications or hints of a contrary intention to extend the meaning of the term so as to include the next of kin.¹ Accordingly it seems that in a direction to divide a fund among *children and the personal representatives of deceased children*;² to divide among several by name, and *in the case of the death of any of them, then to his personal representatives*;³ in a gift to A. or his "proper representatives" after a life estate;⁴ a gift to the "personal representatives of A." on A.'s *death without issue*;⁵ or a gift to be divided *amongst cousins now existing or their representatives*,⁶ the word in each case means the executor or administrator who takes, not beneficially for himself, but by representation and substitution for the benefit of the estate of the decedent.

The presumption is that these words are used in their technical sense, and they should be construed as words of limitation, meaning an executor or administrator, and not of purchase, unless that is the intention of the testator apparent in the will. Thus, in a gift to A. and *his personal or legal representatives*, or a gift to A. *or his personal or legal representatives*, the word means *prima facie* executor or administrator, and gives A. an absolute interest if he survive the testator;⁷ and the fact that the

¹ *Halsey v. Paterson*, 37 N. J. Eq. 445; *Livermore v. Somers* (N. J., 1889), 16 Atl. R. 513; *Cumberlege v. Cumberlege-Ware*, L. R. 45 Ch. D. 269, 278, 59 L. J. Ch. 717, 38 W. R. 767; *In re Turner*, 2 Dr. & Sm. 501, 508; *Cotton v. Cotton*, 2 Beav. 67; *Bridge v. Abbot*, 3 Bro. C. C. 224; *Briggs v. Upton*, L. R. 7 Ch. 376; *In re Crawford*, 2 Drewry, 230, 235, 245; *Dixon v. Dixon* (1857), 24 Beav. 129, 133, 135; *In re Henderson*, 28 Beav. 656; *Leak v. Macdowall*, 33 Beav. 238, 241; *Saber-*

ton v. Skeels, 1 Russ. & Myl. 587, 589; *Gryll's Trust*, L. R. 6 Eq. 589.

² *Price v. Strange*, 6 Madd. 159.

³ *Hinchliffe v. Westwood*, 2 De Gex & S. 216.

⁴ *Corbyn v. French*, 4 Ves. 418, 435.

⁵ *In re Wyndham's Trust*, L. R. 290, 292.

⁶ *In re Crawford*, 2 Drewry, 230, 235.

⁷ *Cox v. Curwen*, 118 Mass. (1875), 198, 200; *Clark v. Cammann*, 43 N. Y. S. 575, 14 App. Div. 127; *Norwood v.*

gift to A. and his personal representatives comes after a life estate in another is not material to vary this construction.¹ So generally a bequest to a personal representative, where the word is plainly a word of limitation, will not be for his benefit individually, but for the purpose for which he holds the personal estate of the individual whom he represents.²

§ 635. Legal or personal representatives means next of kin.—The question frequently arises, in the case of a gift to personal or legal representatives, whether it is direct to them or in substitution on the death of another person. Does the testator mean executors or administrators, which the words signify in their primary sense, or has he used them in a secondary sense to indicate some other class of persons? Where the testator gives personal property in absolute terms to his own personal representative, strong reasons exist against construing the term to mean the executor, because of the fiduciary character which the executor holds to the testator.³ The executor is remunerated by the law, allowing him a commission. It is wholly uncertain during the life of the testator who will be his representative, for the person nominated may not survive the testator; while, if he does survive and qualify, he may become insolvent or extravagant; may dissipate the estate, and be removed. For these reasons it is the rule that slight indications of the intention of the testator to use the words otherwise than to designate his executor will justify construing them as synonymous with next of kin under the statute of distribution.

Many of the reasons before stated are also applicable where

Mills, 1 Ohio N. P. 314; Hill v. Ever-
son, 2 Ohio N. P. 42, 3 Ohio Dec. 133;
Ware v. Fisher, 2 Yeates (Pa., 1795),
578; In re Rankin's Estate, 13 Pa. Co.
Ct. R. 617; Williams v. Knight, 18
R. L. 177 (1893), 27 Atl. R. 210; Ather-
ton v. Crowther, 19 Beav. 448, 451;
Wing v. Wing, 34 L. T. (N. S.) 941. 24
W. R. 878; Price v. Strange, 6 Madd.
159, 163; In re Turner, 2 Smale & Gif.
501; Chapman v. Chapman, 33 Beav.
556; Halloway v. Clarkson, 2 Hare,
523; Taylor v. Beverley, 1 Colly. 108,
116; Saberton v. Skeels, 1 Russ. & M.
587, 589; In re Ware, L. R. 45 Ch.

Div. 269; Lugar v. Harman, L. R. 8
Eq. 139. See also 5 L. R. A. 96.

¹In re Turner, 2 Sm. & G. 501;
Crawford's Trust, 2 Drew. 230; Cum-
berlege v. Cumberlege-Ware, L. R. 45
Ch. Div. 269, 278, 59 L. J. Ch. 717, 98
W. R. 767.

²Smith v. Barneby, 2 Collyer, 728,
737. And see cases in note 1, p. 849.
A legacy of the income of money in
trust to a woman for her life, and on
her death to be paid to her personal
representative, gives her an absolute
interest in the fund. Alger v. Par-
rott, L. R. 3 Eq. 328.

³Ante, § 634.

the testator has given property to a third person and *his* personal representatives. If that person *is alive at the date of the execution* of the will, the testator cannot know whether he will die testate or intestate, or who will be his executor or administrator; or, if he shall die testate, who will be his residuary legatee. But he does know, or may readily ascertain, what persons would be his next of kin under the statute of distribution, and who, to that extent, would represent him. For these reasons the words "legal or personal representatives" are very frequently construed to mean the next of kin by the statute.¹

If the gift is to the legal representatives of the testator himself, the time at which they are to be ascertained is material in determining what persons are meant. The fact that the gift is an immediate one to the testator's legal representative may indicate that by representative he means his executor, who will, as a *quasi*-trustee, take for the benefit of the residuary legatee. But, on the other hand, if the vesting of the gift is postponed, so that the date of ascertaining who is the legal representative comes *after the end of a prior life estate*, by which time, in all probability, the executor of the testator will have been discharged, the inference will be that he means his next of kin.² The same reasoning will apply to a gift of personal property to another person for his life with a power of ap-

¹The leading case is *Bridge v. Smith v. Palmer*, 7 Hare, 225, 227; *Abbot*, 3 Bro. C. C. 224, 227, and this has been repeatedly affirmed and followed. *Kilner v. Leech*, 10 Beav. 363; *Gryll's Trust*, L. R. 6 Eq. 589, 593; *Stockdale v. Nicholson*, L. R. 4 Eq. 359; *In re Horner*, L. R. 37 Ch. D. 695, 57 L. J. Ch. 211, 58 L. T. 103, 36 W. R. 348; *In re Knowles*, 59 L. T. 359; *Robinson v. Evans*, 29 L. T. (N. S.) 715, 22 W. R. 199; *Milne v. Gilbert*, 2 Beav. 67, 69; *Booth v. Vicars*, 1 Coll. 6, 12; *Cotton v. Cotton*, 1 Mad. 45; *Alger v. Parrott*, L. R. 3 Eq. 828; *Long v. Blackall*, 1 Anst. 128, 3 Ves. 486; *Horsepool v. Watson*, 3 Ves. 383; *Walker v. Makin*, 6 Sim. 148; *Styth v. Monro*, 6 Sim. 49; *Briggs v. Upton*, 21 W. R. 30, L. R. 7 Ch. 376, 382; *Robinson v. Smith*, 6 Sim. 47, 48; *Halloway v. Radcliffe*, 23 Beav. 163, 169;

Smith v. Palmer, 7 Hare, 225, 227; *Booth's Estate*, Week. Notes (1877), p. 129; *Tarrant v. Backus*, 63 Conn. 277, 28 Atl. R. 46; *Jones v. Tainter*, 15 Minn. 517 (1870); *Davies v. Davies*, 55 Conn. 319, 11 Atl. R. 500; *Warnecke v. Lemba*, 71 Ill. 92 (1873); *Brokaw v. Hudson*, 27 N. J. Eq. 135; *Phyfe v. Phyfe*, 3 Bradf. (N. Y.) 45; *Drake v. Pell*, 8 Edw. Ch. (N. Y., 1838), 251, 270; *Potter's Estate*, 13 Pa. St. 318; *In re Hall*, 2 Dem. (N. Y.) 112; *Lee v. Dill*, 39 Barb. 520; *Gibbons v. Fairlamb*, 26 Pa. St. 217 (1856); *Lodge v. Weld*, 139 Mass. (1885), 504; *Johnson v. Johnstone*, 12 Rich. (S. C.) Eq. 259, 260; *Abbott v. Jenkins*, 10 Serg. & R. (Pa.) 296.

²*Nicholson v. Wilson*, 14 Sim. 549, 551; *Walker v. Camden*, 16 Sim. 329.

pointment in him of the fee by will, and a limitation, in default of such an appointment, to the personal or legal representatives of the donee.¹ The next of kin of the donee will take in default of an execution of the power.

So where a provision was made for the distribution of the residue among the testator's grand-children and the *representatives* of his deceased grand-children,² or among several individuals named, and, in case of the *death of any of them before the testator*, to prevent a lapse to his or her legal representatives,³ the word "representatives" will be construed to mean the next of kin under the statute, who will take as purchasers under the will. So, too, this word will be construed to be synonymous with "descendants" or "issue," where, upon death, in default of representatives, there is a limitation over to the next of kin.⁴

§ 636. Expressions favoring the next of kin as personal representatives — Division per stirpes or per capita.— Any reference by the testator to the statute of distribution, made in connection with a gift to "legal or personal representatives," will imply a construction in favor of the next of kin taking as representatives. Hence a provision for those persons who should be "*A.'s representatives by or according to the statute of distribution,*"⁵ or a gift which is given in default of an appointment by A. "*to his legal representatives in due course of administration,*"⁶ may indicate, by this reference to the statutory mode of division, that the testator meant the next of kin of A., and not his executor. So, also, the fact that the testator has provided for a division *per stirpes*, and not *per capita*, among personal representatives is a very strong circumstance favoring next of kin, for such a direction is quite inapplicable and unmeaning if an executor alone is meant.⁷

¹ Robinson v. Smith, 6 Sim. 47.

² In re Bates, 159 Mass. 252, 259, 34 N. E. R. 266.

³ Bridge v. Abbot, 3 Bro. C. C. 224, 227; Brent v. Washington, 18 Gratt. (Va.) 526.

⁴ Atherton v. Crowther, 19 Beav. 448. The addition of the word "next" may define personal representative as next of kin. Booth v. Vicars, 1 Collyer, 6, 12.

⁵ Watson v. Bonney, 2 Sandf. Ch.

(N. Y., 1845), 417; Brent v. Washington, 18 Gratt. (Va.) 526.

⁶ Briggs v. Upton, 26 L. T. (N. S.) 376, 382; Wilson v. Pilkington, 11 Jur. 537; Jennings v. Gallimore, 3 Ves. 146.

⁷ Atherton v. Crowther (1854), 19 Beav. 448; Phillip v. Evans, 4 De Gex & Smale, 188. In Atherton v. Crowther there was a gift in remainder to children of A. as a class, but if any of the said children should die in A.'s

Whether a direction that the property which is devised shall be divided *share and share* alike, or *equally*, between or among the personal representatives, defines the word as the next of kin or not, may not be positively determined. It has been held that such a direction,¹ and also a direction to pay "*to or amongst*" the personal representatives of A.,² are inconsistent with an intention that the executor of A. should take; but the contrary has also been held.³ The fact that the testator in a will which in one clause gives property to personal or legal representatives uses the word "executor" or "administrator" in another part of the will, with a correct knowledge of its purport and technical meaning, is almost conclusive as an indication that he uses the words "personal representatives" to mean the next of kin;⁴ while on the other hand, if he uses the words "personal representatives" in one part of his will as meaning executors, that meaning may easily attach to the words throughout the will.⁵

§ 637. Mode of distribution among personal representatives.—In cases where the words "personal representatives" are to be construed as synonymous with next of kin under the statute, the property will be distributed between or among them *per stirpes* according to the statute and as tenants in common.⁶ And where the gift is to A. and B., "share and share alike," or "their personal representatives," the direction

life-time, then for the personal representatives of such child or children to take *per stirpes* and not *per capita*, and the words "personal representatives" was held to signify descendants.

¹Smith v. Palmer, 7 Hare (1848), 225, 228. "To A., if he should be then living; but if he should then be dead, to his legal representative, or representatives, if more than one, *share and share alike*." See also Crawford's Trusts, 2 Drewry, 230, 240, 246; King v. Cleaveland, 26 Beav. 26, 27, 4 De Gex & Jo. 477.

²Baines v. Ottey, 1 Myl. & K. 465.

³Wing v. Wing, 34 L. T. 941, 942, 24 W. R. 878; Taylor v. Beverley, 1

Colly. 108, 116; Chapman v. Chapman, 33 Beav. 556, 557.

⁴Booth v. Vicars, 1 Collyer, 6, 12; Walter v. Makin, 6 Sim. 148, 151; Walker v. Camden, 16 Sim. 329, 332.

⁵Dixon v. Dixon, 24 Beav. 129. And see In re Crawford's Trusts, 2 Drewry, 230, 246; Hinchcliffe v. Westwood, 2 De Gex & S. 216; Chapman v. Chapman, 33 Beav. 556, 557.

⁶Booth v. Vicars, 1 Colly. 6, 12; Rowland v. Gorsuch, 2 Cox Ch. R. 187, 188; Alker v. Barton, 12 L. J. Ch. 16; Walker v. Camden, 16 Sim. 329; Stockdale v. Nicholson, L. R. 4 Eq. 359; Stock's Appeal, 20 Pa. St. 349; Halloway v. Radcliffe, 23 Beav. 163, 171.

for equality of division applies to A. and B. alone.¹ So where there was a direction for division among the representatives of such children of the testator as should *leave children*, the word was construed to mean children, and distribution was directed *per stirpes*.²

§ 638. **Gifts of real property to legal or personal representatives.**—The word “representative,” used in reference to a devise of real property, means the heir.³ Thus, in a direction to divide real property equally among the children of the testator or “their legal representatives,” the word means heirs, and is a word of limitation, not of purchase, and the children take a vested estate in fee at once on the death of the testator.⁴ The word “representatives,” in most cases of this sort, is employed as a word of substitution solely to prevent a lapse.

§ 639. **When executors and administrators take by limitation, and not as purchasers.**—Ordinarily the words “executors” and “administrators” are words of limitation, and not of purchase; as, for example, in a bequest of personal property to A. and his executors and administrators, or to A. and his personal representatives. In a case of this sort the words indicate merely that A. takes an absolute interest in the personal property if he survive, and then his personal representatives derive their title, not *under the will, but from him*. The presumption that the words mentioned are used as words of limitation is recognized not only where a gift is to the executors and administrators *by representation* when the decedent has an absolute title, but also where a bequest is to *a person for life, and after his death to his executors and administrators* or to his personal representatives. This is a very common construction in marriage settlements in England, where personal property is given to trustees to pay the income thereof to the husband for his life, with a remainder to the wife for her life, and with a power of appointment in her by deed or will, and, in default of an ap-

¹ Booth v. Vicars, 1 Collyer, 6, 12; 737; Ewing v. Jones, 130 Ind. 247, 29 Abbott v. Jenkins, 10 S. & R. (Pa.) N. E. R. 1057.

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² Merrill v. Curtis, 39 Atl. R. 973 (N. H., 1898).

³ Chapman v. Chapman, 33 Beav. 556; Smith v. Barneby, 2 Coll. 728,

⁴ Chasy v. Gowdry, 43 N. J. Eq. 95 (1887), 9 Atl. R. 580; Tarrant v. Backus, 63 Conn. 277, 28 Atl. R. 46, construing “legal representatives and their heirs.” See also Ketchum v. Corse, 65 Conn. 85, 31 Atl. R. 486.

pointment, to *her personal representatives, executors or assigns*. If the power of appointment is executed, all estates after the life estate of the wife are defeated. But, on the other hand, as it is clearly the intention of the settlor to benefit the wife in the case of her death before her husband, the words "personal representative" are given their technical meaning; and where she dies without exercising the power and without issue, the property vests in her executor or administrator, as the case may be, for the benefit of her residuary legatee or next of kin.¹

In some cases, even the word "executor" has been held to mean the next of kin. The context would have to be very strong in their favor to justify this construction. Where the provision was that, *in case of the death of any of the legatees*, his or her legacy should go to his or her executor or administrator, it was held that the next of kin should take as purchasers under the original will as against the executor of a deceased legatee.² But a limitation to "executors, administrators and assigns," in default of the exercise of a power of appointment, will receive its technical construction, and the property will go to the personal representatives for the benefit of the estate of the decedent.³

The word "executor," or "administrator," may be a word of limitation even where a gift is directly to them, either apparently by substitution for a deceased person, or without any legacy or implication of a legacy to the person he represents. We are here speaking of the personal representative, not of the testator, but of a third person. In all these cases the personal representative will take for the benefit of the estate of the person he represents; and the party whom he represents will have a disposing power over that property, notwithstanding the peculiar manner in which it is acquired.⁴

¹Smith v. Dudley, 9 Sim. 125, 133; Wyndham's Trusts, L. R. 1 Eq. 290, 292; Bulmer v. Jay, 3 Myl. & K. 204, 4 Sim. 48, 53; Stocks v. Dodsley, 1 Keen, 325, 328.
²Palin v. Hills, 6 Sim. 47, 1 Myl. & K. 470, 485.
³Grafftey v. Humpage, 1 Beav. 46, 52.
⁴Trethewy v. Helyar, L. R. 4 Ch. D. 52, 57; Seymour's Trusts (1859),

Page v. Soper, 11 Hare, 321, 324; Mer-
yon v. Collett, 8 Beav. 386, 392; Allen
v. Thorp, 7 Beav. 72, 75; Devall v.
Dickens, 9 Jur. 550; Saberton v.
Skeels, 1 Russ. & My. 587; Collier
v. Squire, 3 Russ. 467, 475; Wellman
v. Bowring, 2 Russ. 374, 379, 380,
3 Sim. 321; Daniel v. Dudley, 1 Phil.
1; Best's Trusts, L. R. 18 Eq. 686, 690;

§ 640. **Whether an executor or administrator takes in trust or beneficially.**—At common law, before the passage of the statutes 11 Geo. IV, and 1 Wm. IV, ch. 40, where a man died after making a will which contained *no residuary bequest*, but appointing an executor, the executor would take the residue as his own in the absence of a legacy to him or of a clear expression¹ of a contrary intention.² The rule since the statute is otherwise. An executor no longer takes beneficially the residue of personal property which is not disposed of by the will. This rule is applied also to a devise to the executor of the testator as well as to a devise to the executor of another person. The presumption is that the executor takes as a trustee. Thus, where the testator gives property to his executors expressly for a purpose, either to pay debts or legacies, or to devote it to a charitable enterprise,³ and the carrying out of the purpose does not exhaust the fund, they do not take the surplus beneficially, but they hold it for the benefit of the residuary legatee; or, if it is a gift of the residue which fails, as *quasi-trustees* for the benefit of the next of kin.⁴ Accordingly, where there was a devise of property to A. and B., *who were also appointed executors*, “in and for consideration of their paying” the income *to the wife of the testator for life*, leaving the fee undisposed of,⁵ or where a bequest of a legacy and also *of everything to A.* to pay a debt due him, with an appointment of him as executor, and a surplus remained in his hands;⁶ or a gift of the residue to the executors in trust in general terms, but without the purpose being stated,⁷ and the executors were also given specific legacies.⁸ Where the gift was to the executors of the testator and there was no residuary clause what-

Johnson, 472, 479; Holloway v. Clarkson, 2 Hare, 521; Long v. Watkinson, 17 Beav. 471, 474. See cases cited *ante*, § 634, and also the chapter *ante* on Lapse and Substitution.

¹ 2 Black, p. 514.

² Williams v. Arkle, L. R. 7 H. L. C. 606.

³ Dacre v. Patrickson, 1 Dr. & Sm. 182, 185.

⁴ Barrs v. Fewkes, 12 Week. R. 666; Seymour's Trusts, Johnson, 472, 479; Dacre v. Patrickson, 1 Dr. & Sm. 182,

185; Read v. Stedman, 26 Beav. 495; Travers v. Travers, L. R. 14 Eq. 275, 277; Dixon v. Dixon (1857), 24 Beav. 129, 134; In re Henderson, 28 Beav. 656; Andrew v. Andrew, 1 Collyer, 686, 689.

⁵ Bird v. Harris, L. R. 9 Eq. 204.

⁶ Wright v. Revell, 27 L. T. (N. S.) 439.

⁷ Buckle v. Bristow, 13 W. R. 68.

⁸ Chester v. Chester, 12 L. R. Eq. (1871), 444, 451.

ever,¹ or where there was a gift to the executors on trusts which were held to be void,² the court refused to permit the executors to take beneficially, but decreed that they should take for the purpose of the will.³

§ 641. Language which may indicate that the executor is to take in trust.—The use of the words “*in trust*” in a gift to an executor is not conclusive upon the question whether he shall take beneficially or not, for that fact is to be determined upon the whole will.⁴ But it has been contended that where the residue is left to executors in *their own names* as individuals in trust for a particular purpose, which trust does not exhaust the fund, they being trustees as well as executors, though not entitled to the unexpended fund *as individuals*, are entitled to it as *executors, i. e.*, if they qualify as executors. But the distinction is without value. The mere fact that a man is appointed both a trustee and an executor by the same will does not permit him to take beneficially as an individual, for the two capacities are as distinct as though different persons were appointed. If the private and official character of these persons is to be distinguished, the point raised has no value whatever.⁵ And it is immaterial, in this connection, whether the gift is to the executors in the plural, or in the singular, or to “executor and administrator.”⁶ So where a gift of personal property was to B. on the death of A., with a power in B. to appoint by his will, and, in default of his appointment, to his *executor or administrator*, it was held that the executor of B. took the legacy solely for the purpose of B.’s will.⁷ And the same rule was invoked though the legatee has died in the lifetime of the testator, and even where he is dead at the date of the will, and is applicable where the gift is to the personal or *legal representatives*, if those words are construed to be synony-

¹ Trethewy v. Helyar, L. R. 4 Ch. 495, 502; Mopp v. Elcock, 15 Sim. 568, D. 53, 57. 2 Phil. 797; Dawson v. Clark, 15 Ves.

² Neo v. Neo, L. R. 6 P. C. 381. 409; Southouse v. Bate, 2 Ves. & Bea.

³ Barrs v. Fewkes, 12 W. R. 666. 396; Bottle v. Knockor, 46 L. J. Ch.

⁴ Barrs v. Fewkes, 12 W. R. 666; D. 159, 162.

Saltmarsh v. Barrett, 29 Beav. 474, 3 ⁶ Travers v. Travers, L. R. 14 Eq. De Gex, F. & J. 279; Hughes v. 275, 277.

Evans, 13 Sim. 96. ⁷ Collier v. Squire, 3 Russ. 467, 475;

⁵ Read v. Stedman (1859), 26 Beav. Stocks v. Dodsley, 1 Keen, 825, 828,

mous with administrator or executor.¹ The circumstance that a specific legacy is given to an executor, or, if there are several executors, that equal legacies are given each, may be sufficient to exclude them from taking a residue beneficially; for it is absurd for a testator to give a *man a specific legacy whom he intends to take the whole*. These circumstances, coupled with the fact that the residue is given to them as joint tenants, may be quite conclusive that they are to take, not beneficially, but in an official capacity.²

§ 642. **Bequests to executors for their own benefit.**—Notwithstanding the statutory rule in England and America, under which the executor is presumed *prima facie* to take title solely for the benefit of the estate which he represents, it is clear that the testator may give to his executor, or to the executor of another person, as he may to any other person having a capacity to take, a legacy for his own benefit as an individual. According to the most recent decisions, the testator must expressly indicate that the executor shall take for his own use and benefit. The cases are not harmonious as regards what language will give the executor the property for himself individually, and exclude the presumption that he takes it *virtute officii* for the benefit of the estate of his testator. A specific bequest by the testator “to my executor, A.,” with a disposition of the residue, has been in most cases held to constitute a legacy to the executor for his own benefit, and not to him in his official capacity. The employment of the word “executor” is meant simply to describe the person whom the testator intends, and it does not indicate that he is to take as an executor for the benefit of the estate of his testator.³

A direction in a gift by the testator to his executors that

¹ *Leak v. Macdowell*, 33 Beav. 238; *Trethewy v. Helyar*, L. R. 4 Ch. D. 53, 57.

² *In re Henshaw*, 12 W. R. 1139, 34 L. J. Ch. 98, 100; *Saltmarsh v. Barrett*, 29 Beav. 474, 8 De Gex, F. & J. 279, 30 L. J. R. Ch. 853. In *Foster v. Winfield*, 142 N. Y. 327, 37 N. E. R. 111, where a gift was to “my executors . . . in entire confidence they will make such disposition of all the residue as, were I alive, they know

would meet with my approval,” the court held that the executors took a mere power of sale, but no estate either as trustees or individuals.

³ *Billingslea v. Moore*, 14 Ga. (1853), 370, 373; *Halsey v. Convention of Prot. Epis. Church*, 75 Md. 275 (1892), 23 Atl. R. 781; *Kirkland v. Narramore*, 105 Mass. 31, 32; *In re Hollahan's Will*, 5 N. Y. Supp. 842; *Figueira v. Taafe*, 6 Dem. Sur. (N. Y.) 166.

they shall hold for their own use and benefit, or absolutely and forever, may be conclusive evidence that the testator intended they should take beneficially.¹ But the cases do not always require an explicit indication of an intention to benefit the executors as individuals to take the case out of the statute. The English cases have gone very far in this direction. So, where a devise was "all the estate of the testator to A., the executor, upon trust to pay the debts," etc., which payment did not exhaust the residue, he was permitted to take it for his own benefit.² And where the testator, after appointing two executors and giving to each a specific legacy, and providing for the support of his wife and family, gave the residue to the executors by their proper names, it seemed clear to the court that the executors were entitled to take individually.³

§ 643. Beneficial gifts to executors or trustees by name — When conditioned upon acceptance of the office.—Where a legacy is given to a person whom the testator also appoints his executor or his trustee, the presumption arises that the legacy, whether expressly stated to be "for his trouble" or not, was given solely in consideration of his acting as an executor or as a trustee. This presumption is rebutted if it shall appear from the language of the will that the testator intended the legatee to take, whether or not he acted in an official capacity. But where this intention does not appear, if the person nominated by the testator does not accept the office and does not qualify as an executor or trustee, the legacy should not be paid to him.⁴

¹ Wallis v. Taylor, 8 Sim. 241, 245; Sanders v. Franks, 2 Maddock, 147. *Contra*, Hames v. Hames, 2 Kee. 646, 652.

² Clarke v. Hilton, L. R. 2 Eq. 810, 815.

³ Williams v. Arkle, L. R. 7 H. L. 646. See also Romans v. Mitchell, 15 W. R. (1867), 552, 553, and *post*, § 643.

⁴ Rothmahler v. Cohen, 4 Des. (S. C.) Eq. 215; Kirkland v. Narramore, 105 Mass. 31, 32; In re Gardner, 61 L. T. (N. S.) 552; Romans v. Mitchell, 15 W. R. 552; Angerman v. Ford, 29 Beav. 349; Hawkins' Trust, 33 Beav. 570; Jewis v. Lawrence, L. R. 8 Eq. 345, 349; Harris v. Harris (Ky., 1899),

49 S. W. R. 196; In re Henshaw, 12 W. R. 1139, 34 L. J. Ch. 98. In this case a money gift was made to the executors expressly on condition that they should act, and, after other money legacies had been given and the payment of the debts of the testator had been provided, the residue was given to the executors. In a codicil a parcel of real property was devised to them in trust for the testator's children. The court held they took the residue beneficially. Long v. Gardner, 67 L. T. 552; Harrison v. Harrison, 2 H. & M. 237; Fuge v. Fuge, 27 L. R. Ir. 59.

And the presumption that a legacy to one who is also nominated as an executor is conditional on his acceptance of the office is strengthened, if not rendered conclusive, by the fact that in the will the testator states that it is to remunerate him, or that it is in lieu of his commissions or statutory compensation, or that it is for his care and trouble¹ in performing the duties of his office.² But the presumption which arises where the will is silent may be rebutted. It is therefore important to determine what language employed by the testator will be sufficient to rebut this presumption, and to show that the legacy to the executor was not upon a condition that he should qualify and act as executor. It would seem that giving the legacy to the executor where he is named, not *as an executor*, but *as an individual*, would be conclusive proof of an intention that he shall take in any event as an individual.³ So, also, if the legatee, though an executor, is described as *the friend of the testator*, or if the gift is given expressly as a token of regard, so that it appears that the motive of the gift was friendship and affection towards the legatee rather than remuneration for services to be rendered by him as an executor, the mere fact that a legatee *is also an executor* will not make the legacy to him conditional upon his acceptance of the office. So a legacy given by the testator to his friend A., who was also appointed an executor,⁴ or to "my friend A., of the town of M., a banker's clerk and also my executor,"⁵ will, by the implication that the motive prompting the legacy was friendship, cause the legatee to receive the legacy, even though he may not qualify as the executor.⁶ Other circumstances sufficient to rebut the presumption that a legacy is conditional upon acceptance of the office by the executor are that it was given among other legacies,⁷ or that it was to be given to an executor after the death of a tenant for life,⁸ or the

¹ Hawkins' Trust, 38 Beav. 570.

² Morris v. Kent, 2 Edw. Ch. (N. Y.) 174.

³ Stackpole v. Howell, 18 Ves. 417; Chassaing v. Durand, 85 Md. 420, 37 Atl. R. 362.

⁴ Bubb v. Yelverton, L. R. 13 Eq. 131.

⁵ In re Denby, 8 De Gex, F. & Jo. 350.

⁶ See also Read v. Devaynes, 3 Bro. C. C. 95; In re Mainwaring, L. R. 43 Ch. D. 643, 59 L. J. Ch. 63, 38 W. R. 412.

⁷ Calvert v. Sebbon, 4 Beav. 422.

⁸ In re Reeve, 46 L. J. Ch. 412, 36 L. T. (N. S.) 906; Jewis v. Lawrence, L. R. 8 Eq. 345, 347.

circumstance that unequal gifts are made to two or more executors.¹

Assuming that the gift is upon the implied condition that the legatee shall qualify and act as an executor, it is important, in the event of his death before the payment of the legacy, to determine what acts on his part suffice to constitute a sufficient performance of the condition. He must give unequivocal evidence of an intention to act as executor before his representatives can claim on his death. An application for the probate of the will by the legatee is conclusive proof of his intention to qualify as an executor. If, having instituted proceedings to procure letters testamentary, the legatee dies before they are granted, his representatives are entitled to the legacy.²

¹Jewis v. Lawrence, L. R. 8 Eq. 345, 347.

²Scofield v. St. John, 65 How. Pr. (N. Y.) 292; Harrison v. Rowley, 4 Ves. 212; Lewis v. Mathews, L. R. 8 Eq. 277. A legacy to a person on

condition that he shall act as executor will draw interest from the date upon which he qualifies. In re Gardner, 61 L. T. (N. S.) 552; Long v. Gardner, Id.

CHAPTER XXXII.

TESTAMENTARY ESTATES IN FEE TAIL—THE CONSTRUCTION OF “HEIRS OF THE BODY” AS WORDS OF LIMITATION.

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| <p>§ 644. Estates tail at the common law.</p> <p>645. Language by which an estate tail may be created.</p> <p>646. An estate in fee tail may be created by informal words.</p> <p>647. The words “male heirs” create an estate tail.</p> <p>648. Limitations in special fee tail.</p> <p>649. The word “son” as a word of limitation.</p> <p>650. Estates tail by implication.</p> | <p>§ 651. Words directing an equality of division among heirs of the body.</p> <p>652. Words of limitation and inheritance added to “heirs of the body.”</p> <p>653. Estates tail in the United States.</p> <p>654. Statutory regulations of estates tail in the United States.</p> |
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§ 644. Estates tail at the common law.—It is impossible in this work to treat at full length of the rules regulating estates in fee tail. They will be found fully treated in those treatises which have for their object the discussion of the elements of the law of real property.¹ It is sufficient here to say that estates tail owe their origin to the Statute of Westminster II, 15 Edw. I, c. 1, commonly called the statute *de donis*. Prior to the passage of this statute a limitation of a fee to A. and to the heirs of his body was regarded as creating a fee-simple conditional, *i. e.*, a fee on condition. If A. died without issue the lands reverted to the grantor, but as soon as he had issue the condition on which he held the fee was performed, and he had a fee simple absolutely, which he could alienate or charge and so bar his issue, and over which the grantor had no control.² This statute in terms provided that the estate granted to A. should be protected to his issue, and at the same time it deprived the first grantee of all power to alienate the fee of the estate. Its main object was to reserve in the grantor and his heirs the reversion of the fee simple.

¹ 4 Kent, Com., pp. 12, 18; 2 Black. Com., p. 114.

² 2 Black. Com., p. 111.

The fee was in abeyance until an indefinite failure of issue took place, when it reverted to the grantor or his heirs.¹

The perpetuity thus established was, as well may be believed, injurious to the commerce in land; but though numerous attempts were made in parliament to repeal the statute, it was not until the twelfth year of Edward IV that common recoveries were invented, by means of which the estate tail could be aliened. This method of conveying an estate tail, which was the only method down to the beginning of the present century, in England, conveys a fee simple absolutely.²

§ 645. Language by which an estate tail may be created.—A devise to a person and the heirs of his body creates an estate tail general. If the devise is to a person and the heirs of his body by a particular marriage, an estate tail special is created, and descends to the heirs of his body by that marriage. And, also, an estate in tail, general or special, may be limited either to the heirs male or female.³

§ 646. An estate in fee tail may be created by informal words.—The proper and technical language required to create an estate tail is a limitation to the heirs of the body, and this

¹See *Willion v. Berkely*, Plowd. 233, 235, 247.

²*Taltarum's Case*, 5 Co. Lit. 19 B.; *Portington's Case*, 5 Co. 35. In construing the statute the courts held that the donee no longer had a conditional fee which became absolute as soon as issue was born, but that he had a new estate called a fee tail, with an interest in the heirs of his body which he could not affect, and a reversion in fee on an indefinite failure of his issue in the donor. 2 Inst. 335.

³*Smith v. Greer*, 6 S. R. 911, 88 Ala. 414; *Flinn v. Davis*, 18 Ala. 132, 134; *Fellows v. Tann*, 9 Ala. (1846), 1003; *Moody v. Walker*, 3 Ark. (1841), 147; *Myar v. Snow*, 49 Ark. 125, 4 S. W. R. 881; *Johnson v. Johnson*, 2 Met. (Ky.) 331; *Pennington v. Pennington*, 17 Atl. R. 329, 70 Md. 418; *Prescott v. Prescott's Heirs*, 10 B. Mon. (49 Ky.) 58; *Lachland's Heirs v. Down-*

ing, 11 B. Mon. (Ky.) 33; *McMeekin v. Smith* (Ky., 1893), 21 S. W. R. 353; *Riggs v. Sally*, 15 Me. (3 Shep., 1839), 408; *Fisk v. Keene*, 35 Me. 349; *Spencer v. Chick*, 76 Me. 347; *Stansbury v. Hubner*, 20 Atl. R. 904, 73 Md. 228; *Wells v. Beall*, 2 Gill & J. (Md.) 458; *Brown v. Addison Gilbert Hospital*, 155 Mass. 323, 29 N. E. R. 625; *Williams v. Hichborn*, 4 Mass. 189; *Brown v. Rodgers* (Mo.), 28 S. W. R. 630; *Doty v. Teller*, 54 N. J. L. 163, 23 Atl. R. 944; *Kennedy v. Kennedy*, 29 N. J. Law, 186; *Wendell v. Crandall*, 1 N. Y. 491; *Shalters v. Ladd*, 141 Pa. St. 349, 21 Atl. R. 596, 28 W. N. C. 33; *Linn v. Alexander*, 59 Pa. St. 43; *Cooper v. Coursey*, 3 Coldw. (43 Tenn., 1867), 416; *Manchester v. Durfee*, 5 R. L. (1857), 549; *In re Kelso's Estate*, 69 Vt. 272, 274, 37 Atl. R. 747; *Sydnor v. Sydnor*, 2 Munf. (Va., 1811), 263; 2 Black. Com., p. 114.

estate cannot be created without words of procreation in a deed at the common law. But in construing wills the rule is otherwise. Thus, a limitation to A. and *his offspring*,¹ or to A. and *his family*, according to seniority,² to A. *et semini suo*,³ to A. and his heirs of the *third generation*,⁴ to A. and his bodily heirs,⁵ to A. and his heir (in the singular) *lawfully begotten*,⁶ or to A. and his "legal heirs,"⁷ or to A. and the heir of the body of A. *who may be living at his death*,⁸ or to A. and the *heir* of his body, in the singular,⁹ gives A. an estate in tail. So, also, where the word "issue" is used as a word of limitation, meaning simply the "heirs of the body," as to A. and his issue, they take by descent, and it will be an estate in tail in A.¹⁰ And the same rule of construction is applied to a limitation to children,¹¹ where it clearly appears that the testator has used the word "children" as equivalent to "heirs of the body," taking in the whole line of lineal descendants.¹²

§ 647. The words "male heirs" create an estate in tail. A devise to the "*male heirs*" of the testator,¹³ to A. and his *male heirs*,¹⁴ to A. and his *heirs male who attain the age of twenty-*

¹ Young v. Davis, 2 Dr. & Smale, 167. See also Barber v. Railroad Co., 166 U. S. 83, 89; Allen v. Markle, 36 Pa. St. 117.

² Lucas v. Goldsmid, 29 Beav. 657.

³ Co. Lit. 9 b; 2 Black. Com., p. 114.

⁴ Naylor v. Loomis, 9 Ohio Cir. Ct. R. 96, 2 Ohio Dec. 114; Mortimer v. Hanley, 6 Ex. 47, 3 De Gex & Smale, 316.

⁵ Barret v. Beckford, 1 Ves. 521.

⁶ Hall v. Vandegrift, 3 Binn. (Pa., 1811), 374; Dubber v. Trollope, Amb. 458, 8 Vin. 233, pl. 13; Whiting v. Wilson, 1 Buls. 219. So held in Church v. Myatt, Moore, 637, Co. Lit. 20b, 9, 27. See also Nanfan v. Legh, 2 Marsh. 107, 7 Taunt. 85, where the limitation was *et hæredibus suis legitime procreatis*.

⁷ Perry v. Kline, 12 Cush. (Mass.) 123, 125. But see *contra*, Mathews v. Gardner, 17 Beav. 254; Simpson v. Ashworth, 6 Beav. 412, where the words "lawful heirs" are used.

⁸ Richards v. Lady Abergaveny, 2 Vernon, 32.

⁹ Pawsey v. Lowdall, Styles, 249, 273.

¹⁰ See *post*, § 670.

¹¹ *Ante*, § 580.

¹² Seibert v. Wise, 70 Pa. St. 147, 149; Knoderer v. Merriman (Pa., 1887), 7 Atl. R. 152; Bone v. Tyrrell, 118 Mo. 173, 20 S. W. R. 796; Wheatland v. Dodge, 10 Met. (Mass.) 502; Nightingale v. Burrell, 15 Pick. (Mass.) 104; Haldeman v. Haldeman, 40 Pa. St. 29; Merryman v. Merryman, 5 Munf. (Va.) 440.

¹³ Ford v. Lord Ossulton, 11 Mod. 189; 1 Wash. R. P. 110.

¹⁴ Dawes v. Ferers, 2 P. W. 1; Baker v. Wall, 1 Lord Ray. 185; Doe d. Lindsey v. Colyear, 11 East, 548, 563; Hamilton v. Hampstead, 8 Day (Conn., 1808), 332; Fraser v. Chene, 2 Mich. (1852), 81. 91; Cooper v. Cooper, 6 R. L. 261; Brownell v. Brownell, 10 R. L. 509, 513, 514; 8 Vin. Ab., A., pl. 13;

one,¹ to A. and his heir male, in the singular,² or to A. and his oldest heir male,³ creates an estate tail male in A., though words of procreation are not employed. The same rule will apply to a limitation to A. and his heirs female. If the devise is to A. for life, and after his death to his heirs male or heirs female in fee, the first taker will take a fee tail special by the operation of the rule in Shelley's case.⁴ In all such cases the words "of the body" will be inserted by implication. This construction is strengthened by a devise over upon an indefinite failure of issue or upon an indefinite failure of an heir male.⁵ Whether a limitation to the *next heir male* will enable him to take by descent or purchase depends upon nice distinctions of language. If the devise is to A. for life, remainder to his *next* heir male, simply,⁶ or to A. and to his *first male heir*,⁷ or to A. and his wife for life, remainder to the *next* male heir of their bodies,⁸ A. takes an estate in fee tail special by the operation of the rule in Shelley's case. But if the testator, after a life estate in the ancestor, has added words in a devise to the next heir male, indicating that he intends that person to be a new stock of inheritance, he who is the next heir male at the death of the first taker will take as *persona designata*. So where the land is devised to A. for life, and after his death to his *next heir* male, and to *the heirs male of the body of such heir male*, the person thus designated as next heir male will take a contingent remainder by purchase, which is defeated by his death before his ancestor, in which event he can never be an heir, but vesting in him absolutely on the death of the ancestor.⁹ And the same rule

1 Preston on Estates, 213, 314, 536; Hawkins on Wills, p. 173; 2 Black. Com., p. 115; Co. Lit. 27a.

¹ Doe d. Tremewen v. Permewen, 11 Adol. & Ellis, 431.

² Osborne v. Shrieve, 3 Mason, C. C. (1825), 391; Brownell v. Brownell, 10 R. L. 509, 513; Canedy v. Haskins, 13 Met. (Mass.) 389, 402; Blackburn v. Stables, 3 Ves. & B. 367, 369; Lisle v. Pullin, Strange, 729, 731.

³ Cuffe v. Milk, 10 Met. (51 Mass.) 366, 380; Canedy v. Haskins, *supra*.

⁴ Doe d. Lindsay v. Colyear, 11 East, 548, 563; Brownell v. Brownell, 10 R. L. 509, 513. See also Baker v.

Wells, 1 Lord Raymond, 185; Southcote v. Stewell, 1 Modern, 226, 237; Wright v. Vernon, 4 Jur. (N. S.) 113, 2 Drewry, 449, 451, 7 H. L. C. 85; Allgood v. Blake, L. R. 7 Ex. 363; Ashenhurst's Case, Hob. 34.

⁵ Osborne v. Shrieve, 3 Mason, C. C. 391; Malcolm v. Malcolm, 3 Cush. (57 Mass., 1849), 472; Doe d. Winter v. Perratt, 5 Barn. & Cress. 65, 3 M. & Sc. 605.

⁶ Burley's Case, 1 Vent. 230; 16 Viner, Abr. (H.), pl. 4, n.

⁷ Dubber v. Trollope, Amb. 453.

⁸ Roberts on Gavelkind, 122.

⁹ Archer's Case, 1 Rep. 66.

applies if the added limitation is to the heirs general of the next heir male.¹

§ 648. **Limitations in special fee tail.**—A devise to A. and *his heirs by his present wife* creates an estate tail special in A. from which the wife is excluded, and only the issue engendered between them can take.² But where there is a limitation to the heirs of the body of B. and C. lawfully begotten, if they are man and wife it is an estate tail in both, and the oldest son³ or the heirs of the body of *either* take, though not begotten by or on the other; on the other hand, if the devise be to the wife of A. and *her* heirs by A. begotten, she and her heirs by A. take an estate in tail and he is excluded.⁴ But, in any event, in order that an estate in special fee tail shall be created in the issue of any two persons, they must be husband and wife, or they must be persons who can possibly become such. If an estate is devised to A. and B. and the heirs of *their* bodies, and they cannot become husband and wife, either because they are of the same sex, because they are related within the prohibited degrees, or because one is deceased, each takes but an estate for life. On the other hand, if the parties can marry, it is not material that they are at the date of the death of the testator married to others, for their respective partners may die, and they may intermarry.

If the persons are in fact husband and wife at the date of the death of the testator, the fact that the birth of children is impossible *in rerum natura* does not defeat the estate in tail. An estate in tail after the possibility of issue is extinct is then created in both. So, also, a similar estate exists where an estate in special tail is attempted to be created in a husband and wife and their issue, and one dies without leaving issue, but leaving the other surviving. The survivor then has simply a life estate. But such an estate can only be created by the death of one party; never by the procurement of a divorce.⁵

¹ Willis v. Hiscox, 4 My. & Cr. 197. (N. S.) 1113, 2 Black. Com., p. 113; *Contra*, Canedy v. Haskins, 13 Met. Welliver v. Jones, 106 Ill. 80, 46 N. E. (54 Mass., 1847), 389, 402, where the R. 712.
property was limited to the heirs general of the "eldest male heir."

² Wheart v. Cruser, 49 N. J. L. 475, 15 Atl. R. 36; Wright v. Vernon, 2 Drewry, 439, 7 H. L. Cas. 35, 4 Jur.

³ Stephens v. Britridge, 1 Lev. 36; Davis v. Hayden, 9 Mass. 514.

⁴ Denn v. Gillot, 2 T. R. 431.

⁵ The importance of the rules in the text is manifested, as it has been

In conclusion it should be said the rule in Shelly's case does not apply to a remainder to the heirs of the body of A. to be begotten *on* her by her husband.¹ But the rule has been applied to a remainder to the heirs *of* the body of the wife by a particular husband.²

§ 649. The word "son" as a word of limitation.—Whether the word "son" shall or shall not be regarded as a word of limitation, or as a word of purchase, depends wholly, as in the case of the word "children," upon the intention of the testator as apparent from the will. In an early case where the devise was to A. in indeterminate language, and if he dies "not *having* a son" (meaning "not *leaving* a son") then over, the court held that "dying without a son," the term being *nomen collectivum*, was equivalent to "dying without issue," and meant an indefinite failure of issue, giving the parent by implication an estate in tail male.³ Here the word "son" was a word of limitation synonymous with "issue," or "male heir." In most English cases it is not regarded as *designatio personæ*, pointing out who is to take under the will, but rather to point out those who, as issue or male descendants, are to take by descent from the ancestor, giving him in effect an estate in tail male.⁴ But a devise to "A. for his life, and after his death *to his sons and their heirs forever equally*," does not create a fee tail male in the state of Virginia;⁵ and even in England a limitation to A. and the heirs of his body, to be enjoyed by his first, sec-

held that a statute converting the "fee tail general into a fee simple estate has no application to a fee tail special." Pennington v. Pennington, 17 Atl. R. 329, 70 Md. 418. The contrary is held where the statute simply has reference to an estate in tail. Welliver v. Jones, 166 Ill. 80, 46 N. E. R. 712.

¹ Gossage v. Taylor, Styles, 325; and compare Robinson v. Wharrey, 8 Wils. 125, 144, which is *contra* to the text.

² Alpass v. Watkins, 8 T. R. 516. The distinction between heirs *on* the body and heirs *of* the body is fine and eludes the ordinary intellect.

³ Byfield's Case, citing King v. Mellish, 1 Vent. 225, 231; Milliner v. Robinson, 1 Moore, 682, pl. 939; Robinson v. Robinson, 1 Burr. 38, 3 B. P. C. Toml. 180; Garrod v. Garrod, 2 B. & A. 87; Andrew v. Andrew, L. R. 1 Ch. D. 410.

⁴ Mellish v. Mellish, 2 Barn. & Cressw. 520, 523-525, 3 Dow. & Ry. 804. Where the devise was to "A. and her son, but, if she had more than one daughter, to the eldest; but if no children at her death," then over, A. took an estate in tail male.

⁵ Walker's Adm'r v. Lewis, 90 Va. 578, 19 S. E. R. 258.

ond, third, etc., *sons*, gives A. an estate for life, and his sons take as purchasers.¹

The same question that has arisen as to the meaning and effect of the word "sons" has also arisen in construing the words "*eldest son*." If these latter words are words of limitation, they are synonymous with "male heir of the body," and the father will take an estate in special fee tail male. If they are words of purchase they simply designate a person who, at the death of the father, should be the eldest son then living,² and he will take a vested estate in fee simple as a purchaser. It was at one time held that in a devise to A. for life, with remainder to his "*eldest son*," and a devise over on A.'s death *without lawful issue*, that A. took an estate tail male, the words "eldest son" being words of limitation, and the rule in Shelley's case being applied.³ This early case has been subsequently followed.⁴ The case in which the words "eldest son" were construed as words of limitation fixed a meaning so contrary to the general and primary sense of the words that in a subsequent consideration of the same will at considerable length in the House of Lords nearly a century later, the earlier rule was condemned. It was then determined that the words "eldest son," or "first" or "other sons," were not primarily words of limitation, but that they designated the person who should take as purchaser in remainder, and that he took as a purchaser.⁵ Nor will the fact that the testator, after devising land to A. for life with a remainder to his eldest son, provides for an indefinite failure of issue, alter this construction under existing rules to make the estate a tail male, as it would be ordinarily where there is a devise over on an indefinite failure of issue of the first taker.⁶ And in a case of a devise to

¹ Law v. Davis, Strange, 849.

² Gardiner v. Guild, 106 Mass. 25, 28.

³ Chorlton v. Craven, 3 Dow. & Ry. 808, and Simpers v. Simpers, 15 Md. 160. And a devise, prior to the statute abolishing the rule in Shelley's case, to A. for life, "and at his death to descend to the eldest *male heir of his body*, and on failure thereof to his heirs general," is within the rule. Goodrich v. Lambert, 10 Conn. (1835), 449. See also cases *post*, § 661.

⁴ Lewis v. Puxley, 16 Mee. & Wel. 733, 740 (1847); and Forsbrook v. Forsbrook, L. R. 3 Ch. App. 93, 98 (1867), where the limitation was to the eldest sons of two life tenants, who should take for their lives, and "so on the *eldest sons* of the two families forever."

⁵ Parker v. Tootal, 11 H. L. Cas. 143.

⁶ Doe d. Burrin v. Charlton, 1 Scott N. R. 290, 302-308, 1 M. & Gr. 429.

the eldest son, with a limitation over "*without having a son*," this will not alter the construction, because it is simply equivalent to death without leaving such eldest son, since, if the father die without any son, there can of course be no eldest son surviving him.¹

§ 650. Estates tail by implication on an indefinite failure of issue.—If the testator devise an estate to A. and his heirs, and couple this with a devise over of the property on the first taker's death without issue, or equivalent words, the first taker takes an estate in fee tail. This is of course assuming that the testator has used the words "dying without issue" as meaning an indefinite failure of issue.² In all cases where there is a devise over after the devise in fee, upon the failure of issue or death without issue of the first devisee, the word "heirs" will be construed to mean "heirs of the body," and the first taker will take an estate tail, with a contingent remainder over to take effect upon a total extinction of his issue at any time. This has been the rule in England for centuries,³ and is also the rule in the United States.⁴

¹ *Bennett v. Bennett*, 2 Dr. & Sm. 268; *Andrew v. Andrew*, L. R. 1 Ch. D. 410, 412.

² In the absence of statute, as is elsewhere explained in this work, a limitation over in case of the death of the first taker without issue means an indefinite failure of issue, though this presumption is never conclusive, and may be rebutted by language in the context indicating that the testator used the words to denote a definite failure of issue, *i. e.*, a failure of issue *surviving the primary devisee*. *Post*, § 844 et seq.

³ *Sunday's Case*, 9 Co. 127 B.; *Robinson's Case*, 1 Ventris, 230; *Clark's Case*, 1 Rolle's Abr. 839, pl. 4, Moor. 593; *Tracy v. Glover*, cited 3 Leon, 130, pl. 183; *Doe d. Neville v. Rivers*, 7 T. R. 276; *Doe d. Ellis v. Ellis*, 9 East, 382; *Soule v. Garrard*, Cro. Eliz. 525; *Chadock v. Cowley*, Cro. Jac. 695; *Browne v. Jervis*, id. 290.

⁴ *Durden v. Burns*, 6 Ala. (1844), 368; *Moody v. Walker*, 3 Ark. (3 Pike,

1840), 147; *Myar v. Snow*, 49 Ark. 125, 4 S. W. R. 381; *Neville v. Northrop*, 51 Conn. 33; *St. John v. Dann*, 66 Conn. 401, 34 Atl. R. 110, 112; *Hudson v. Wadsworth*, 8 Conn. (1831), 348, 360; *Mainwaring v. Taber*, 1 Root (Conn., 1789), 79; *Blair v. Vanblarcum*, 71 Ill. 290; *Summers v. Smith*, 21 N. E. R. 191, 127 Ill. 645; *Fisk v. Keene*, 35 Me. 349, 355; *Pratt v. Flamer*, 5 Harr. & J. (Md., 1822), 10; *Chew v. Chew*, 1 Md. (1851), 163; *Haxton v. Archer*, 3 Gill & J. (Md.) 199; *Hurlburt v. Emerson*, 16 Mass. 241; *Albee v. Carpenter*, 12 Cush. (66 Mass.) 382; *Parker v. Parker*, 5 Met. (Mass.) 134, 139; *Ide v. Ide*, 5 Mass. (1809), 500; *Hall v. Priest*, 6 Gray, 18, 20; *Hawley v. Northampton*, 8 Mass. 3; *Nightingale v. Burrell* (1833), 15 Pick. 104, 114; *Gifford v. Choate*, 100 Mass. 343, 345; *Allen v. Trustees*, 102 Mass. 262, 264; *Brown v. Hospital*, 155 Mass. 323, 326; *Goodell v. Hibbard*, 32 Mich. 47, 54; *Wilson v. Wilson*, 19 Atl. R. 132, 46 N. J. Eq. 321; *Chet-*

The same rule generally is applicable where the devise is to A. and his heirs, and then over on *default of heirs*. If the devisee over is himself the heir of the first taker, and would take the fee from him by descent in case he should die without issue surviving him, then the limitation over on "dying without heirs" will be construed as equivalent to death without heirs of the body indefinitely, or without issue, and the primary devisee will take an estate in fee tail.¹ Thus, where the devise was to A. and B. and their heirs, and if either should die without heirs, then to the other,² or to A., and if she should die without heirs, then to her brother,³ an estate tail was held to have been created in the first taker.

Whether a devise creates an estate tail where it is *expressly for the life of A., and in default of issue over*, has been much discussed. The application of the rule to such a case was denied in England. As the testator very clearly intended that A. was to take a life estate, the court could not contradict the intention and by implication give him an estate in fee tail. But in other cases where the devise was to A. for his natural life, *remainder to the heirs of his body*, with a devise over on his death without issue, it was held that he took an estate in tail,

wood v. Winston, 40 N. J. L. 337; Moore v. Rake, 26 N. J. L. 574; Fostick v. Cornell, 1 Johns. (N. Y., 1806), 440; Ross v. Toms, 4 Dev. (12 N. C.) L. 377; Saunders v. Hyatt, 1 Hawks (8 N. C., 1821), 247; Paxson v. Lefferts, 3 Rawle (Pa.), 59; Duer v. Boyd, 1 Serg. & R. (Pa., 1814), 203; Heffner v. Knapper, 6 Watts, 18; Eichelberger v. Barnitz, 9 Watts (Pa., 1837), 447; Wynn v. Story, 38 Pa. St. 166; Pierce v. Hakes, 23 Pa. St. 231; Russell v. Hubbell, 24 Pa. St. 244; Moody v. Snell, 81 Pa. St. 359; Hackney v. Tracy, 137 Pa. St. 53, 20 Atl. R. 560; Ray v. Alexander, 23 Atl. R. 383, 29 W. N. C. 241, 146 Pa. St. 242; In re Hoff, 147 Pa. St. 636, 23 Atl. R. 890; Adams v. Chaplin, 1 Hill, Eq. (S. C., 1833), 265; Thomason v. Anderson, 4 Leigh (Va.), 118; Bells v. Gillespie, 5 Rand. (Va.) 278; Williamson v. Daniel, 12 Wheat. (U. S.) 568; Parkman

v. Bowdoin, 1 Sumn. C. C. 359; Osborne v. Shrieve, 3 Mason, C. C. 391. If the contingency of death without issue or heirs is coupled with another event, as, for example, death without heirs in the life-time of A., the failure of issue is definite, and the first devisee takes a conditional fee with an executory devise over. Pells v. Brown, Cro. Jac. 590; Denn v. Kemeys, 9 East, 366; Doe v. Chaffey, 16 M. & Welsby, 656. See cases note *supra*.

¹Chesebro v. Palmer, 68 Conn. 207, 36 Atl. R. 42; Doe v. Lampleugh, 3 Houst. (Del., 1867), 469; Seybert v. Hibbert, 5 Pa. Super. Ct. 537, 41 W. N. C. 85; Cochran v. Cochran, 127 Pa. St. 486, 17 Atl. R. 981; Titzell v. Cochrane, 10 Atl. R. 9.

²Hawley v. Northampton, 8 Mass. 8.

³Lee v. Craigen, 8 Leigh (Va., 1837), 449.

under the rule in Shelley's case, provided, of course, that the failure of issue intended by the testator was an indefinite failure of issue. And even where the estate was for A.'s life, with a remainder to *another person* (B.), and if A. should die without issue, then over to C., it was held that this limitation gave him a fee tail.¹ A different rule has been laid down in the United States, wherever by statute the failure of issue is presumed to mean a failure of issue living at the death of the testator. If, therefore, land shall be devised to A. for life, the remainder in fee not being expressly disposed of, but on A.'s death without issue, then to others, the limitation on death without issue will not enlarge the life estate in A. to a fee tail.² A devise to a person *in indeterminate language*, or to *him and his heirs*, and in case he dies leaving no child or children, or if he dies without children, then over to others, gives the devisee named an estate in tail by implication, and a remainder in fee limited over thereon is valid, and will vest if A. dies without leaving children surviving at his death.³

¹ *Bamfield v. Popham* (1702), 1 P. Wms. 54, 57; *Blackborn v. Edgeley*, 1 P. Wms. 605; *Langley v. Baldwin*, 1 P. Wms. 759; *Stanley v. Leonard*, 1 Eden, 87; *Attorney-General v. Sutton*, 1 P. Wms. 754, 3 Bro. P. C. 75; *Par v. Swindels*, 4 Russ. 238; *Key v. Key*, 4 D., M. & G. 73; *Machell v. Weeding*, 8 Sim. 4.

² *Flinn v. Davis*, 18 Ala. (1850), 132, 134; *Stone v. Franklin*, 89 Ga. 195, 15 S. E. R. 47; *Thomas v. Miller*, 161 Ill. 60, 43 N. E. R. 848; *Wilson v. O'Connell*, 147 Mass. 17, 16 N. E. R. 578; *Eldred v. Shaw* (Mich.), 70 N. W. R. 545; *Curtis v. Longstreth*, 44 Pa. St. 297; *Walker v. Milligan*, 45 Pa. St. 178; *Lee v. Law* (Va.), 19 S. E. R. 255. A will provided as follows: "To my daughter M., I direct my executors to pay her the interest arising from the two-fifths of my estate during her natural life, and at her death the principal, being the two-fifths of my estate, is to be equally divided between her children, share and share alike; but, if my said daughter M.

should die without leaving issue, then the said interest hereby devised to her shall revert to my estate." *Held*, that the daughter took an estate tail, which, under act April 27, 1855, becomes an estate in fee simple. *In re Robinson's Estate*, 140 Pa. St. 418 (Pa. Sup.), 24 Atl. R. 297; *Appeal of Bowie*, *id.*

³ *Matthews v. Hudson*, 81 Ga. 120, 7 S. E. R. 286; *Richardson v. Richardson*, 80 Me. 585, 16 Atl. R. 250; *East v. Garrett*, 84 Va. 523, 9 S. E. R. 1112; *Holden v. Wells*, 18 R. I. 802, 31 Atl. R. 265; *Ralston v. Truesdell*, 178 Pa. St. 429, 35 Atl. R. 813; *In re Moorhead's Estate*, 180 Pa. St. 119, 36 Atl. R. 647; *Moore v. Gary*, 149 Ind. 51, 48 N. E. R. 630; *Raggett v. Beaty*, 2 M. & P. 512, 5 Bing. 243. To A., and if he have a child, then for such child after the parent's decease, but if no child, then over, where A. had no child, either at the death of the testator nor date of will, gave her an estate tail. *Doe d. Jones v. Davis*, 4 B. & Ald. 43. To A. for his life, and to

The doctrine of the creation of an estate tail by implication, above explained, has no application whatever where an estate is a fee simple, with a limitation over upon failure of issue, and it appears either from the will itself, or where the common-law rule is modified by statute, that the failure of issue referred to is the failure of issue living at the death of the first taker. If the primary devisee has an estate in fee which is defeasible upon a *definite failure, i. e., of issue living at his death*, it becomes indefeasible in him on his having issue who survive him, and he may provide for such issue by devising the fee to them. When the testator limits an estate to some person upon the death of his heir at law without issue, the heir at law will take an estate by implication, providing the failure of issue referred to is an indefinite failure, and there is a devise over of the fee, either expressly or by necessary implication.¹

§ 651. Words directing equality of division among heirs of the body.—The presumption that the words “heir of the body” or “heirs of the body” are used in a technical sense, though it obtains in the large majority of cases, is not always conclusive. The law of construction that the intention of the testator, however expressed, must prevail, will be enough to vary the meaning of these words, if it is apparent that the testator, though using the technical words, has used them in a non-technical sense.

Elsewhere it is explained that the rule in Shelley’s case is never applied to a devise to A. for life, remainder in fee to his children;² and if the testator, though using the words “heir of the body” or “heirs of the body” in the creation of a remainder, evidently intended those words to describe the children of the life tenant, the rule will not apply;³ for it is immaterial what words the testator uses if we ascertain whom he meant.

his son, if he have any, and to the eldest son of that son, *if he have one*; but if no son of A., or no eldest son, then to B., gives A. an estate tail male. Doe d. Garrod v. Garrod, 26 B. & A. 87; *ante*, § 649.

¹ Goodridge v. Goodridge, 7 Mod. 453, 455, in which the devise was to A. for life, and if C., the heir at law, shall die without heirs, then D. shall enjoy the land. See also Newton v. Barnardine, Moore, 127, Owen, 29, in

which case the devise was if R. die before he hath any issue, so that the lands descend to G. And see Doe d. Cape v. Walker, 2 M. & G. 113, where the language was, “if it shall happen my son B. and my two daughters die without issue of their bodies,” lawfully begotten, then my lands go to D. and his heirs.

² *Post*, § 662.

³ *Ante*, § 616.

Here we must consider the effect of the words indicating equality of division in affixing the meaning "children" to the term "heirs of the body." Thus, for example, suppose there shall be a devise to A. for his natural life, remainder to the heirs of his body, "*share and share alike*," or "*to take equally*," or "*in equal parts*," or "*to be equally divided among them*," or with similar words indicating an intention that the heirs shall take concurrently and equally. Under such circumstances we will have to choose between two alternatives. For, assuming that the words "heirs of the body" are used in a technical sense as words of descent, the direction for an equal division is, in most instances, absolutely repugnant to them. If the testator intended that *all* the heirs of the body shall take in succession, as they will by descent, they can never take equally where they happen to be related in unequal degrees to the ancestor. The English cases, arguing that the general intent manifest from the whole will shall overrule a particular intent manifested in any portion of it, have taken the words used in a technical sense, and have rejected as irreconcilably repugnant to them the words indicating a particular intention that the heirs of the body should take concurrently and distributively. Accordingly, where the devise was to A. for his life, and to the heirs of his body as *tenants in common*,¹ or to A. and the heirs of his body, *whether sons or daughters, as tenants in common*,² or to A. for life, and to the heirs of his body "in such shares, manner or form as A. should by the will appoint,"³ the rule in Shelley's case was applied, and A. took an estate in fee tail. As respects the influence of a direction that heirs shall take as tenants in common on the rule in Shelley's case, the law is firmly settled in England. The words "as tenants in common" are usually rejected; and, though it has been said that the testator may, *by proper language*, show that by "heirs of the body" he means children, yet he must do so in words which are *very clear in their meaning*. Where the testator used the word "child" or "children" in connection with a remainder limited to heirs of the body, the court in England

¹ Doe d. Chandler v. Smith, 7 T. R. 532; Bennett v. Earl of Tankerville, 5 East, 548.

² Pierson v. Vickers, 5 East, 548; Bosnall v. Harvey, 4 B. & Cr. 610.

³ Doe d. Cole v. Goldsmith, 7 Taunt. 209.

refused to construe the words "heirs of the body" as meaning "children," despite this clear expression of intention. Such was the case¹ where the devise was to "A. for life, remainder to the heirs of his body in such shares as he should by will appoint, and, in default of appointment, then to the heirs of his body *share and share alike as tenants in common*; and if but *one child*, the whole to such *child*." It was argued: *First*, that A. took a life estate for the reason that he could not appoint to all heirs in succession, and that, hence, the testator meant heirs as purchasers. *Second*, that *all* descendants could not be tenants in common, and that, as the words "heirs of the body" in the two clauses must mean the same person, and as children are referred to in one clause, "heirs of the body" must mean children throughout the will. Although the will states that the estate is to be given to one *child*, if there be only one, and although *children* are undoubtedly included among "heirs of the body," the court expressly overruled these arguments, saying that it does not by any means follow that "heirs of the body" *must* mean children only, if the general intent is otherwise. Despite the cogency of the reasoning, which would have convinced any American court that the testator intended, by using the words "heirs of the body" to indicate "children," the House of Lords, with peculiar English adherence to precedent and technical phraseology, applied the rule in Shelley's case; holding that the words mentioning tenancy in common and equality of division had no effect whatever in affixing a non-technical meaning to the words "heirs of the body."²

In America a direction that heirs, or heirs of the body, who take in remainder, shall share *equally*, has great weight as evidence of an intention that they shall *not* take by descent. Where the devise is to heirs, or to heirs of the body, "*share and share alike*," or "to take *equally*," it will be presumed that the testator did not intend heirs by descent to take in succession, but that he meant by heirs of the body either the *chil-*

¹ Jesson v. Wright, 2 Bligh, 1.

² The earlier cases of Doe d. Long v. Laming, 2 Burr. 1100; Doe d. Hallen v. Ironmonger, 8 East, 533; Doe d. Strong v. Goff, 11 East, 668; Crump

d. Wooley v. Norwood, 7 Taunt. 362; Gretton v. Haward, 6 Taunt. 94, may be regarded as expressly, or by implication, overruled by Jesson v. Wright, *supra*.

dren of the life tenant, or such persons, and no other, who at his death were the heirs of his body, and those persons will take the fee as purchasers under his will.¹ This presumption is very materially strengthened where the fee is limited to the *heirs general of the heirs of the body*, or to their executors and assigns;² or by the circumstance that in another part of the will the word "children" is coupled with "heirs of the body," as to the heirs of her body, *each child share and share alike*.³

¹Dunn v. Davis, 12 Ala. 135; Sharman v. Jackson, 30 Ga. (1860), 224; Lillibridge v. Ross, 31 Ga. (1861), 730; Zavitz v. Preston, 96 Iowa, 52, 54, 64 N. W. R. 668; Prescott v. Prescott, 10 B. Mon. (49 Ky., 1850), 56, 58; Tanner v. Livingston, 12 Wend. (N. Y., 1834), 83; Ward v. Jones, 5 Ired. Eq. (40 N. C., 1847), 400; Mills v. Thorne, 95 N. C. 362; Swain v. Roscoe, 2 Ired. L. (24 N. C., 1842), 200; Bedford v. Jenkins, 96 N. C. 254, 259, 2 S. E. R. 522; Bunnell v. Evans, 26 Ohio St. 409; Findlay v. Riddle, 3 Binn. (Pa., 1810), 139; Steiner v. Kolb, 57 Pa. St. 123, 124; Clemens v. Hecksher, 185 Pa. St. 478, 487, 40 Atl. R. 80; Dukes v. Faulk, 37 S. C. 255, 268, 16 S. E. R. 122; Williams v. Foster, 3 Hill, Law (S. C., 1836), 193; Dott v. Cunningham, 1 Bay (S. C., 1795), 453, 455; Vaden v. Hance, 1 Head (Tenn.), 300, 304; Self v. Tune, 6 Munf. (Va., 1820), 470. *Contra*, Holt v. Pickett (Ala., 1896), 20 S. R. 432; Sims v. Georgetown College, 1 App. D. C. 72; Ross v. Jones, 4 Dev. L. (15 N. C., 1833), 376; Kennedy v. Kennedy, 29 N. J. L. 185, 188; Quick v. Quick, 21 N. J. Eq. 13, 19; Watts v. Clardy, 2 Fla. (1843), 369; Thompson v. Mitchell, 4 Jones' (N. C.) Eq. 441; Cooper v. Cooper, 6 R. L. 261; Brant v. Gelston, 2 Johns. Cas. (N. Y., 1801), 284.

²Dukes v. Faulk, 37 S. C. 255, 16 S. E. R. 122.

³Lockman v. Hobbs, 98 N. C. 541, 4 S. E. R. 627. In Powell v. Glen, 21 Ala. (1852), 458, on p. 466, Dargan,

C. J., said: "The words 'heirs of the body' ordinarily are words of limitation and not words of purchase, but they are frequently used in wills to denote 'children,' or as synonymous with 'children,' and when used in that sense by the testator we must construe them as words of purchase and not of limitation. And when, from other expressions in the will, we see that the estate of the first taker is restricted to a life estate, and the property devised by the terms of the will is to vest in the children of the first taker that may be then (at the death of the first taker) in life, we must then construe the words 'heirs of the body' as words of purchase and not of limitation. Any other rule of construction than this would violate the intention of the testator, or fail to carry that intention out when it would be lawful to do so. Indeed, all authorities agree that though the words 'heirs of the body,' or 'dying without issue,' do ordinarily create an estate tail, yet they may be restricted and explained by other expressions; and if, from such other expressions, we see that the testator intended that the estate of the first taker should cease with his life, and the property given should then vest in his children, or, in default of children at the time of his death, then over to another, in such case we cannot refuse to give effect to the remainder without violating the well-settled rules of law."

§ 652. Words of limitation and inheritance added to “heirs of the body.” — If the testator by the use of proper language expressly creates an estate tail, it is not material that he limits the estate to the heirs general of the heirs of the body, or to the *heirs and assigns* of the heirs of the body. Thus, a devise to “A. and the heirs of his body, and *their heirs and assigns forever*,” creates in A. and the heirs of his body a fee tail, and the inconsistent language will be rejected or will be regarded as controlled by the language which precedes it.¹ So, also, where there is a limitation to A. for life, remainder to the heirs of *his* body, and “*their heirs and assigns forever*,” the latter limitation does not prevent the application of the rule in Shelley’s case,² and A. will take an estate in fee tail.³

§ 653. Estates tail in the United States.— Estates tail, as forming part of the common law of real property, were introduced with it into the original thirteen colonies, and have been extended with the extension of the common law into the other states, so far as they have not been expressly abolished by stat-

¹ Blair v. Van Blarcom, 71 Ill. 290, 292; Malcolm v. Malcolm, 3 Cush. (57 Mass., 1849), 472; Wight v. Thayer, 1 Gray (67 Mass., 1854), 284, 287, 289; Hall v. Thayer, 5 Gray (71 Mass.), 523; Corbin v. Healy, 20 Pick. (37 Mass.) 514; Buxton v. Uxbridge, 10 Met. (Mass.) 87, 91; Den v. Laquear, 4 N. J. Law, 301; Barlow v. Barlow (1849), 2 N. Y. 386, 387; Brown v. Lyon, 6 N. Y. (1852), 419, 421; Pollock v. Speidel, 27 Ohio St. 86; Heilman v. Bouslagh, 13 Pa. St. (1850), 344; George v. Martin, 16 Pa. St. 95; Osborn v. Shrieve, 3 Mason C. C. 391; Legate v. Sewell, 1 P. W. 87; Minshull v. Minshull, 1 Atk. 411; King v. Burchell, 4 T. R. 296; Roe v. Grew, 2 Wils. 322; Blandford v. Applin, 4 T. R. 82.

² Andrews v. Lothrop, 20 Atl. R. 97, 17 R. I. 60; Manchester v. Durfee, 5 R. I. (1858), 549; Paxson v. Lefferts, 3 Rawle (Pa.), 59; Morris v. Ward, 36 N. Y. 587; Goodright v. Pullynn, 2 Ld. Raymond, 1437; Wright v. Pearson, Amb. 358; Gearing v. Shenton, 1 Cowp. 410; Measure v. Gee, 5 B. & A.

910; Kinch v. Ward, 2 Sim. & Stu. 409, 3 Greenl. Cruise, p. 346. See also cases cited on this point, *post*, § 660.

³ A devise to five daughters of the testator, “to be to them an estate for life, and to the heirs of their bodies after them, and to the heirs and assigns of such heir forever, . . . it being my will and intent to give an estate in fee to such of my daughters as shall die leaving issue, and an estate for life only to such of them as shall die without leaving any issue to survive them,” gives the daughters estates in fee tail. Manchester v. Durfee, 5 R. I. 549. So a life estate in A., and after his death to A.’s eldest male heir, and upon the death of such male heir to his male heir and his heirs forever, creates an estate tail male in A. Malcolm v. Malcolm, 3 Cush. (Mass.) 472. And a devise to A., “the heirs of his body and their assigns forever,” creates an estate tail in the first devisee. Pollock v. Speidel, 27 Ohio St. 86.

ute.¹ In South Carolina they were never recognized, and in that state a devise to A. and the heirs of his body has always created a fee conditional as at the common law prior to the statute *de donis*.² In some of the states, however, estates tail are still recognized to a modified extent. This is the case in Pennsylvania³ and Massachusetts,⁴ though they are barred by deed, as in the case of a fee simple. Elsewhere the abolition of these estates is so recent that some consideration of the mode in which estates tail may be created by will is indispensable.⁵

§ 654. Statutory regulation of estates tail in the United States.—In Alabama,⁶ California,⁷ Connecticut,⁸ Delaware,⁹ Florida,¹⁰ Georgia,¹¹ Kentucky,¹² Indiana,¹³ Iowa,¹⁴ Maine,¹⁵ Mich-

¹ Flinn v. Davis, 18 Ala. 132, 134; Allyn v. Mather, 9 Conn. (1832), 115; Wells v. Olcott, Kirby (Conn., 1786), 118; Johnson v. Johnson, 2 Met. (59 Ky., 1859), 331, 333; Partridge v. Dorsey, 3 Har. & J. (Md.) 302; Riggs v. Sally, 15 Me. (1839), 408; Jackson v. Van Zandt, 12 Johns. (N. Y.) 169; Hawley v. Northampton, 8 Mass. 3; Dennett v. Dennett, 40 N. H. 498, 505; Holcomb v. Lake, 24 N. J. L. 686; Doty v. Teller, 54 N. J. L. 163; Pollock v. Speidel, 17 Ohio St. 439; Price v. Taylor, 28 Pa. St. 95; Giddings v. Smith, 15 Vt. 344; Sydnor v. Sydnor, 2 Munf. (Va., 1811), 263.

² Du Pont v. Du Bose, 29 S. C. 665.

³ Reinhard v. Luntz, 37 Pa. St. 488; Potts' Appeal, 30 Pa. St. 172; Taylor v. Taylor, 63 Pa. St. 486; Guthrie's Appeal, 37 Pa. St. 9.

⁴ Wight v. Thayer, 1 Gray (67 Mass., 1854), 284, 286; Buxton v. Uxbridge, 1 Met. (42 Mass., 1840), 87; Davis v. Hayden, 9 Mass. 514; Weld v. Williams, 13 Met. (Mass.) 486; Nightingale v. Burrell, 15 Pick. 104, 116.

⁵ In Pennsylvania a devise to A., and in the event of her "dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold, and the pro-

ceeds to be equally divided among the heirs of J.," creates an estate in tail in A. Barber v. Pittsburgh, F. W. & C. Ry. Co., 166 U. S. 83, 99, 17 S. Ct. 488.

⁶ R. S. 1867, § 1570; R. S. 1876, § 2179; Code, § 1825; Smith v. Greer, 88 Ala. 414, 6 S. R. 911.

⁷ Code, §§ 763, 764.

⁸ Act of 1784, Gen. St., ch. 89, §§ 4, 8; ch. 90, § 36; Allen v. Trustees, 102 Mass. 262, 264.

⁹ Code 1872, p. 507, § 27.

¹⁰ Thompson's Dig., tit. 2, ch. 1, § 4.

¹¹ Code 1873, p. 391, § 2250; Robert v. West, 15 Ga. 122, 145; Pownel v. Harris, 29 Ga. 736; Ford v. Cook, 73 Ga. 215; Craig v. Ambrose, 80 Ga. 134, 4 S. E. R. 1; Wilkerson v. Clark, 80 Ga. 367, 7 S. E. R. 319.

¹² Gen. St. 1873, p. 585; Gen. St., ch. 63, art. 1, § 8; Daniel v. Thompson, 14 B. Mon. (Ky., 1854), 662; Deboe v. Lowen, 8 B. Mon. (Ky., 1848), 616; Pruitt v. Holland, 92 Ky. 641, 18 S. W. R. 883; Sanders v. Wade, 30 S. W. R. 656; McMeekin v. Smith, 21 S. W. R. 353.

¹³ R. S. 1876, p. 368, § 36.

¹⁴ Stat. 1873, § 355.

¹⁵ R. S. 1871, p. 559, § 4.

igan,¹ Maryland,² Minnesota,³ Mississippi,⁴ New York,⁵ North Carolina,⁶ Ohio,⁷ Oregon, Pennsylvania,⁸ Rhode Island,⁹ Tennessee,¹⁰ Virginia,¹¹ Vermont, Washington, West Virginia,¹² Wisconsin,¹³ and perhaps in other states, estates tail are by statute turned into fees simple. In those states, any devise which by its terms would have created an estate tail at the common law will now be construed to create an estate in fee-simple absolute. In Arkansas,¹⁴ Illinois,¹⁵ New Jersey¹⁶ and Vermont,¹⁷ an interest which would have been an estate tail at the common law is now an estate for life in the first taker, and a contingent

¹ Comp. Laws, 1871, ch. CXLVII, § 3, p. 1325; *Fraser v. Chene*, 2 Mich. 81.

² Acts Md. 1820, ch. 191, § 1; *Pennington v. Pennington*, 70 Md. 418. Where a will provided that, on the death of the devisee, the property "should descend to her lawful heirs, and, should she die without legal issue," it should revert to the estate of the testator, the word "heirs" will be restricted to mean "heirs of the body," and the devisee will take an estate tail general, which (by act Md. 1786, ch. 45) would be converted into a fee-simple estate. *Dengel v. Brown*, 1 App. D. C. 423; Act 1786, ch. 45; R. S. 1860, p. 136, § 24; *Railroad Co. v. Patterson*, 68 Md. 606, 13 Atl. R. 369; *Mason v. Johnson*, 47 Md. 247.

³ R. S., § 3, p. 613.

⁴ Laws 1857, p. 307; Stat. 1871, § 2286. See *McKenzie v. Jones*, 39 Miss. 230, 231.

⁵ By statute in 1782. *Lott v. Wyck-off*, 2 N. Y. 355; *Wendell v. Crandall*, 1 N. Y. 491.

⁶ Battle's Rev. 1873, p. 383, § 1; Act 1784, ch. 22; *Ross v. Toms*, 4 Dev. (N. C.) L. 376; *Sanders v. Hyatt*, 1 Hawks (8 N. C., 1821), 247; *Folk v. Whitley*, 8 Ired. (30 N. C., 1848), L. 133; *Leathers v. Gray*, 96 N. C. 548, 2 S. E. R. 355.

⁷ 1 S. & Ct. R. S., § 550; R. S. 1869, p. 550.

⁸ Act of April 27, 1855, § 1; P. L. 36; 1 *Purd. Dig.*, p. 620, pl. 8. Estates tail in Pennsylvania descend as at common law. *Shalters v. Ladd*, 141 Pa. St. 349, 21 Atl. R. 596; *Duer v. Boyd*, 1 S. & R. (Pa.) 203; *Reinhard v. Lantz*, 37 Pa. St. 491; *Nicholson v. Bettle*, 57 Pa. St. 384; *Linn v. Alexander*, 59 Pa. St. 43.

⁹ Gen. Stat. 1872, p. 348; ch. 171, § 2, p. 313; *Andrews v. Lathrop*, 17 R. I. 60, 20 Atl. R. 97. The effect of this statute is to enlarge the devise entail into a fee simple in the children of the first taker. *Wilcox v. Heywood*, 12 R. I. 196; *Sutton v. Miles*, 10 R. I. 348. See also *Manchester v. Durfee*, 5 R. I. 549.

¹⁰ Code 1858, § 2007; *Cooper v. Coursey*, 2 *Coldw. (Tenn.)* 416.

¹¹ *Tinsley v. Jones*, 13 *Gratt. (Va.)* 289; *Nowlin v. Winfree*, 8 *Gratt. (Va.)* 346; *Ball v. Payne*, 6 *Rand. (Va.)* 73; *Doe v. Craiger*, 8 *Leigh (Va.)*, 449; *Bramble v. Billups*, 4 *Leigh (Va.)*, 90.

¹² Code 1868, § 460.

¹³ R. S. 1878, ch. 95, § 2027.

¹⁴ R. S. 1874, p. 273; R. S. 1888, p. 268.

¹⁵ Act of July 1, 1872; R. S. 1880, pp. 266, 273.

¹⁶ *Doty v. Teller*, 54 *N. J. Law*, 163, 23 *Atl. R.* 944; Act of June 13, 1820 (P. L. 178; Rev., p. 299.)

¹⁷ Laws 1874, p. 446.

remainder in his heirs. In Vermont, by an early statute, the lands given in fee tail descended to the children of the first taker equally;¹ and in Missouri an estate tail has been by statute converted into an estate for life, with a remainder to the children of the primary devisee,² and, if none, to his heirs general.³

¹Stat. 1789, pp. 76, 77.

²Stat. 1866, p. 442; *Brown v. Rodgers* (Mo.), 28 S. W. R. 630.

³Mo. R. S. 1845, p. 219, § 5; *Bone v. Tyrrell*, 113 Mo. 175, 20 S. W. R. 796. In Vermont, by Vermont Statutes, section 2201, a devise in fee tail creates an estate for the life of the first

tenant in tail, and a contingent remainder in the person to whom the estate tail would have passed on the death of the first taker according to the course of the common law. *Kelso's Estate*, 37 Atl. R. 747, 69 Vt. 272, 274.

CHAPTER XXXIII.

THE APPLICATION OF THE RULE IN SHELLEY'S CASE TO WILLS.

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| <p>§ 655. The origin and history of the rule in Shelley's case.</p> <p>656. The life estate in the ancestor and the remainder must be created by the same instrument.</p> <p>657. Exceptions to the operation of the rule.</p> <p>658. Whether the rule will yield to the intention.</p> <p>659. English cases in which an explanatory context was held to exclude the rule.</p> <p>660. The meaning which may attach to "heirs of the body" from the context.</p> <p>661. Terms in which "heirs" or "heirs of the body" may be described.</p> | <p>§ 662. The rule is not applicable to remainders to children.</p> <p>663. The rule in Shelley's case as applied in equity.</p> <p>664. Trusts executory and executed defined and distinguished.</p> <p>665. Executory trusts in wills.</p> <p>666. The rule in Shelley's case in the United States.</p> <p>667. Statutes abolishing the rule in the United States.</p> <p>668. The rule in Shelley's case applied to personal property.</p> <p>668a. The general effect and the practical operation of the rule in Shelley's case.</p> |
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§ 655. The origin and history of the rule in Shelley's case.—The legal doctrine known as the rule in Shelley's case has so prominent a place in the law of devises that some discussion of its origin and history is proper in this place. In Shelley's case¹ the rule is stated to be, "that when an ancestor by any gift or conveyance taketh an estate of freehold, and in the same gift or conveyance it is limited, either mediately or immediately, to his heirs in fee or in tail, 'the heirs' are words of limitation of the estate, and not words of purchase," and the ancestor takes the fee simple or the fee tail, as the case may be.² The

¹ 1 Co. Rep. 93, 104 A.

² "When a person takes an estate of freehold, legally or equitably, under a deed, will or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality

to his heirs, or heirs of the body, as a class of persons to take in succession, the limitation to the heirs entitles the ancestor to the whole estate." Preston on Estates, vol. 1, p. 263; 4 Kent, 207; approved in Pierson v. Lane, 14 N. W. R. 90, 60 Iowa, 60; Kiene v. Gmehle, 85 Iowa, 312, 316, 52 N. W. R. 232.

rule is much older than this case. Several cases which may be found in the Year Books are cited in Shelley's case as sustaining the rule, and it is probable that it had its origin in the courts of common law, long prior to any case which has been reported. Sir William Blackstone¹ has cited a case from 18 Edward II, as establishing the rule. It doubtless had its origin in the principles of the feudal system, as they were applied to land tenures in England, and which were reaffirmed, if indeed they were not introduced, by the Normans at the Conquest.²

Now, it should be remembered that the king or other feudal landlord enjoyed peculiar privileges as a landlord, in case of the descent of land which was held under him, which he did not enjoy otherwise. The heir of the tenant who held by knight service, or other military tenure, taking by descent, had certain obligations to meet to his landlord, from which he would have been exempt in case he took as a purchaser. For example, if the heir, being a male infant, were to take by descent, the lord was entitled to his wardship during his minority, with an opportunity of enjoying the rents and profits of the land during that period. On the other hand, if the tenant left one or more female heirs, the lord had the right of selecting husbands for them, which right, it may well be assumed, was more frequently exercised for the pecuniary advantage of the lord than for the benefit of the female wards.³ And in either case, where the heir was an adult and took by descent, various sums of money could be demanded as so-called reliefs under the principles of the feudal system.

During the five centuries that the legislative and judicial machinery of the kingdom were monopolized by the land-owning and land-holding classes, the rule was supported and affirmed whenever possible.⁴ The common-law courts, with their adherence to precedent and their devotion to technicalities, followed it implicitly. It was a recognized rule of the common law for centuries, applicable equally to deeds and to wills; and

¹ In *Perrin v. Blake*.

² It is futile to discuss the question whether or to what extent the feudal system prevailed in England prior to the Norman conquest; it is sufficient to say that shortly thereafter, feudal tenures of land were firmly estab-

lished in England, and that for many centuries almost all land in England was held in such tenure. 2 Black. Com., p. 44.

³ 2 Black., p. 69.

⁴ *Fearne, C. R.* 75-89.

it was immaterial whether, in the latter class of instruments, the testator's intention would be nullified by it. But with the enlargement of the scope of equity jurisdiction incident to the enforcement of trusts in real estate, courts of equity, as will be explained in the sequel,¹ to a certain extent refused to apply it to limitations which were not strictly of a common-law nature.

The theory that the rule in Shelley's case owes its origin and establishment *wholly* to the principles of tenure which prevailed under the feudal system has been controverted by some respectable authorities. In a well-known case² its origin is attributed to the aversion which existed at the common law to the inheritance being in abeyance. For where an estate is limited to A. for life, with remainder to his heirs, the remainder is contingent, for the reason that because *nemo est hæres viventis* it was impossible to tell who were the heirs of A. until the death of A., when they would ultimately take as purchasers. In the meantime they could not at common law alienate their interests except by an estoppel until the death of the ancestor,³ nor could he convey the fee simple, as he had only a life estate. If the fee was vested in the ancestor, as it would be by the application of the rule, the heirs would take by descent from him, and as a result the fee might be alienated by him a generation sooner.⁴ So, too, it may be that the rule had its origin in the fact that in early times a feoffment or a grant to A. and his heirs was intended to be in fact as well as in words a gift *to the heirs*. A., though tenant in fee, could not sell without the lord's consent, nor could he, until the statute of wills, *then* devise it; also, by the common law, under a grant in indeterminate language the grantee took only a life estate and his heirs took nothing. Hence it is easy to see how in early times a grant to A. *for life, and after his death to his heirs*, was taken to mean precisely the same as to *A. and his heirs*, and that the word "heirs," which is now merely a technical word of limitation, was then almost if not quite equivalent to words of purchase, giving a distinct and independent interest to the heirs, which it was the policy of the lord to favor.⁵ The rule in Shelley's case is only

¹ See *post*, § 663 et seq.

⁴ See *post*, § 668a.

² *Perrin v. Blake*, 4 Burr. 2579, 1 W. Bl. 672. See also Hargraves, L. T. 489.

⁵ In *Perrin v. Blake*, *supra*, the testator devised his estate to his son W., and the infant of which his wife was

³ *Post*, chapter on Remainders.

applicable where the limitation to the heirs is by way of a contingent remainder. An executory devise to heirs, or a shifting or a springing use to the heirs of a person who himself takes a previous estate of freehold, vests in the heirs as purchasers and not by descent.¹

§ 656. **The life estate in the ancestor and the remainder must be created by the same instrument.**—In order that the rule in Shelley's case shall be applicable to a limitation to one for his life, and remainder to his heirs, it is indispensable that *both interests shall be given by the same instrument*. A will and any paper which is incorporated with it by reference² are regarded as one instrument for this purpose.³

So, for the same purpose, a will and the various codicils added to it are one paper, whether attached or not. But where a parent by a marriage settlement conveys land to his child for life, and by his subsequent will devises a fee in remainder in the same to the issue of the marriage, the issue take as purchasers, and not by descent,⁴ for the estates are not created by the same instrument.

The question has been asked whether the rule in Shelley's case applies where a freehold estate is created by an instrument which also confers a power to appoint the remainder *by another instrument*, as a devise to A. for life with a power of appointment in him by deed or will among his heirs or the heirs of his body. Some authorities, relying on the rule that the objects of the exercise of the power take under the first

pregnant, for the term of their natural lives, with a remainder to G. and his heirs for the life of said son W. and the infant, with the remainder to the heirs of the body of said son and said infant; and various remainders over for life and in fee. The widow proved not to be *enceinte*. The question was whether A. took an estate for life with a remainder to the heirs of his body, or whether he took a fee tail. On the first trial of this case Lord Mansfield, with Ashton and Willes, held that he took an estate for life; subsequently it was determined in the exchequer that

he took an estate in fee tail. For other English authorities on the rule in Shelley's case, see Whiting v. Wilkins, 1 Bulstrode, 219; Lloyd v. Carew, Pre. Ch. 72, Show. 137; Rundale v. Eley, Carthew. 170; Broughton v. Langley, 2 Lord Raymond, 873, 2 Salkeld, 679; Lisle v. Gray, Sir Th. Jones, 114, 2 Levinz, 223, Pollex. 582.

¹ Lloyd v. Carew, Pre. Ch. 72.

² See §§ 279-284.

³ Hayes d. Foord v. Foarde, 2 W. Bl. 698.

⁴ Moore v. Parker, 1 Lord Raymond, 37; Skinner, 559.

instrument, maintain that the rule would apply, and that consequently the heirs would take by descent.¹

This may be correct where the power of appointment is to be exercised among heirs, though even then a court of equity would, in default of an appointment, raise an estate in the heirs by implication, in which case they would take as purchasers under the will by which the power to appoint was created, and the rule in Shelley's case would not apply to their interests. However this may be, it is well settled by the cases, as will be subsequently more fully explained, that a devise to A. for life, with a power in him to appoint among his issue in such shares and proportions as he may elect, does not come under the operation of the rule.²

§ 657. Exceptions to the operation of the rule.—It is absolutely essential to the application of the rule that a freehold estate should be devised to the ancestor. If he has only a chattel interest the rule will not apply;³ for any estate limited after a chattel to his heirs is not a common-law remainder, but an executory devise.⁴ Such a limitation over after a chattel will only be sustainable in equity by the operation of the statute of wills, and, *not being a common-law estate*, common-law rules, such as the one under consideration, are not applicable. If, therefore, a limitation to the heirs be an executory devise, they always take as purchasers, never by descent from their ancestor.⁵

And where an estate is limited to A. for life, with remainder to his heirs, and A. dies *before the testator*, the heirs will take as purchasers under the will; for, as they can take nothing by descent, the intention of the testator to give them an interest as purchasers under the will must be respected.⁶

¹ Fearn, Cont. Rem., p. 75; Sugden on Powers, p. 472; Hayes on Limitations, 51. But Preston on Estates, 324, is *contra*. It is surprising that this question is not oftener raised. It seems to be assumed that the rule is not applicable.

² *Post*, § 673.

³ *Cf. post*, § 852.

⁴ See *post*, § 846.

⁵ Lloyd v. Carew, Finch, Pre. Ch. 72, per Lord Cranworth, in Coape v. Arnold, 4 D. M. & G. 589; Fearn, Cont. R., p. 276; Gilbert, Uses, 21.

⁶ The rule in Shelley's case does not apply to an executory devise to take effect during the continuance of an estate tail, and where the beneficiaries under the devise were not the heirs of the body at large, but designated persons of that class. This was so held in a very recent English case where the limitation was an executory devise in trust "to be legally conveyed and assured unto such heirs of my child or children in equal shares as they shall severally and respectively attain the age of twenty-

§ 658. **Whether the rule will yield to the intention.**—The rule in Shelley's case is one of positive law, not of construction. Whether it shall give way before a contrary intention depends on the following considerations: The intention of the testator must be sought after and followed in all wills, irrespective of the rule in Shelley's case; and the intention is to be ascertained only by first ascertaining the sense in which the testator has used the words which are found in his will.

The *first* question, therefore, in the case of a devise to A. for life, with remainder to his heirs or to the heirs of the body, is, "*Whom did the testator intend to describe by the word 'heirs?'*" Until this is ascertained it cannot be known whether the rule will apply. This is to be ascertained only by the employment of the ordinary rules of construction, of which the rule in Shelley's case forms no part.¹ The English authorities raise a strong presumption in favor of the words "heirs" or "heirs of the body" being always taken in their technical primary sense; and would apply the rule in Shelley's case invariably to all devises which *by their language* come within its operation, irrespective of a declared intention on the part of the testator that the first taker is to have only a life estate.² Thus,³ where the testator declared it to be "*his intention and meaning that none of his children should take an estate for a term longer than their lives,*" while the court of first instance permitted this intention to control, the court of review reversed this decision. The result of this has been that even an express declaration of an intention to create a life estate cannot overcome the rule, provided it appears that the testator has employed the words "heirs" or "heirs of the body" in their technical sense.

There is always a very strong presumption that he has employed them in that sense as words of limitation, and not as words of purchase. But the presumption is not conclusive. It may be shown that they are used in another and secondary sense. It is not only necessary to seek after the meaning of

one years, or be married, and to their several and respective heirs and assigns forever." *Foxwell v. Van Grutten*, 78 *Law Times* (N. S.), 231.

¹ On this point, see *ante*, § 606 et seq.

² But no expression of intention that the ancestor shall have only a

life estate, and the heirs a contingent remainder, can be plainer than an express limitation to A. for his natural life, and to his heirs in remainder.

³ *Perrin v. Blake*, 4 Burr. 2579.

the words as to what *persons* are to take, but in *what capacity* they are to take. When we endeavor to ascertain whom the testator meant by "heirs" or "heirs of the body," and have ascertained that he meant those who would take land by descent on the death of the life tenant, the question arises, how shall they take? That is to say, shall they take by descent from their ancestor, or shall they take as purchasers, as a new stock of inheritance? If he used the words in their strict and primary sense, the rule in Shelley's case applies, and they will take by descent.

The burden of proof is upon him who claims that heirs are to take as purchasers; and while, if it appears that the words "heirs" or "heirs of the body" are used in their technical and legal sense as words of descent, an inconsistent expression of intention that the ancestor shall take a life estate will not be permitted to overcome the technical meaning,¹ yet a secondary meaning may be attached to the words. If it shall appear from the will itself that the testator used the words "heirs" or "heirs of the body" in the sense of sons, daughters or children, as words of purchase, the rule will not apply;² for the question in construing wills is not, What words has the testator used? but, What meaning did he attach to them?

And in those cases which permit the rule to be overcome by an expression of intention, there is always something besides the mere express limitation "to A. and his heirs," which gives a signification to the word "heirs" other than its primary and

¹ *Baker v. Scott*, 62 Ill. (1871), 88; *Van Olinda v. Carpenter*, 127 Ill. 42, 19 N. E. R. 868; *Thomas v. Higgins*, 47 Md. (1877), 439; *Warner v. Spiegg*, 62 Md. 14; *Hileman v. Bouslagh*, 13 Pa. St. (1849), 344, 351; *Cockin's Appeal*, 111 Pa. St. 26; *List v. Rodney*, 83 Pa. St. (1877), 483, 491; *Kleppner v. Lavery*, 70 Pa. St. 70, 78; *Crockett v. Robinson*, 46 N. H. 461 (1866); *Polk v. Faris*, 9 Yerg. (Tenn.) 209, 236. The rule in Shelley's case is applicable, without regard to the intention of the testator, whenever the situation is created that is pertinent to it. *Lippincott v. Davis* (N. J.), 28 Atl. R. 587.

² *McMahon v. Newcomer*, 83 Ind. 565, 568; *Millett v. Ford*, 109 Ind. 159, 164; *Conger v. Lowe*, 124 Ind. 368, 374; *Jackson v. Jackson*, 127 Ind. 346, 349; *Earnhart v. Earnhart*, 26 N. E. R. 895, 127 Ind. 397; *McCrary v. Lipp*, 85 Ind. 116, 121; *Zavitz v. Preston*, 96 Iowa, 52, 53; *Slemmer v. Crampton*, 50 Iowa, 302, 304; *Pierson v. Lane*, 60 Iowa, 60, 14 N. W. R. 90; *Kiene v. Gmehle*, 85 Iowa, 87, 89; *De Vaughn v. Hutchinson*, 17 S. Ct. 461, 166 U. S. 566, 570; *Crawford v. Wearn*, 20 S. E. R. 724, 115 N. C. 540; *Gerhardt's Estate*, 160 Pa. St. 253, 28 Atl. R. 684; *Little's Appeal*, 117 Pa. St. 14, 11 Atl. R. 520; *Smith v. Hastings*, 27 Vt. 475.

technical one; but the intention to use the words "heirs" or "heirs of the body" in any other than in a strict and legal sense must be unequivocally shown. This intention must appear so plainly that no one can misunderstand it.¹ It has been so laid down where the testator said he intended his son to have *a life estate and nothing more*,² or where he gave him the income for life, but that he should *have no power to dispose of the same for a term longer than his life*.³

If it appear that the word "heirs" is used in its legal sense, the expressed intention that the ancestor shall have a life estate alone will be disregarded.⁴

¹ Guthrie's Appeal, 37 Pa. St. (1860), 9, 13.

² Robinson v. Robinson, 1 Burr. 38, 2 Ves. 225; Perrin v. Blake, 4 Burr. 2579; Thong v. Bedford, 1 Bro. C. C. 313.

³ Wescott v. Binford (Iowa, 1898), 74 N. W. R. 18; Bedford v. Jenkins, 96 N. C. 254, 2 S. E. R. 522.

⁴ Van Olinda v. Carpenter, 127 Ill. 42, 19 N. E. R. 868; Lippincott v. Davis (N. J., 1897), 28 Atl. R. 587; Ewing v. Barnes, 156 Ill. 61, 40 N. E. R. 61. Parol evidence of statements that the testator meant to give a life estate is, of course, inadmissible. Brown v. Bryant (Tex., 1898), 44 S. W. R. 399; McCrary v. Lipp, 85 Ind. 116, 121. In a recent Iowa decision upon a devise of land to one, "to hold the same during the term of his natural life," and giving him the use, rents and profits of it during such time, but providing that he should "have no power to convey or dispose of the same" for a period longer than his life, and that at his death it should descend to his heirs, it was held that the word "heirs" will not be given its technical effect, and the rule in Shelley's case will not apply, as it was testator's clear intention to create a life estate only. Wescott v. Binford, 74 N. W. R. 18. "The rule does not assume to fix or shackle the meaning of words. It

strikes at the intention, when discovered, but it furnishes no touchstone for directing the import of the limitations; that is entirely without the province of the rule, and is left to the uncontrolled operation of general principles. On the one hand, the word 'heirs,' though properly a word of limitation, will not by its magic attract the rule, if it be clearly used as a substituted term for 'sons' and 'children,' etc.; on the other hand, the words 'sons,' 'children,' etc., though properly words of purchase, will not repel the rule, if they be clearly used as substituted terms for 'heirs.' The rule wars not with words; it leaves to the common rules of exposition the task of working out the meaning, and stands aloof until they have performed it." Hayes, R. Estate, 95. "The rule . . . is a rule of property and of public policy, not of intention merely or construction. By this it is not meant to assert that the intention of the grantor is to be altogether excluded, as to the entire instrument, in fixing upon it a construction or interpretation. But it matters not how distinctly in point of intention it may appear that the grantor meant that the first taker should have a life estate only, if it further appeared that by the use of the terms 'heirs of the body,' 'issue,' 'sons,' 'children,' etc., he meant

§ 659. English cases in which an explanatory context excludes the operation of the rule.— Though a strong presumption exists that “heirs of the body” are to be taken as words of limitation, it is not always conclusive. If the testator shows by the context that by “heirs of the body” he clearly means “children” or some other class who are to take as purchasers, the rule will not apply.¹ Thus, for example, where, after a remainder “*to the heirs male of the body of A.*,” the testator provides that “*such sons* shall take in order of seniority of age and priority of birth,”² the elder of such sons to be preferred, or where the remainder is given to “male heirs” in succession, and, in default of *such male children, to the female children*,³ or to the heirs of the body of husband and wife, and, if *more children than one*, then to all,⁴ or to the heirs of the body, and, on the death of the parent, “*to divide equally among the children*,” and if but *one child*, then to such only child,⁵ or to the male heirs *in such proportion as their father shall appoint*,⁶ it will be presumed that the testator meant children or sons only, by the words “heirs of the body,”⁷ and they will take by purchase.

But the intention to use the word “heirs,” or “heirs of the body,” in the sense of words of purchase must be clearly apparent, for the presumption is in favor of their being words of limitation, and this presumption will be recognized “except where the intention of the testator to the contrary is so plain that no one can misunderstand it.”⁸ A direction that an es-

the descendants of the first taker should take in their character of heirs a descendible estate of inheritance, exhausting the lineal stock of the first taker. . . . It matters not how strongly or how clearly the grantor may intend that the instrument shall not be controlled by the rule of law, yet if the proper construction of the terms which he has used in the entire instrument bring it within the operation of the rule of law, the rule of law and not his intention must have effect.” Reese, J., in *Polk v. Faris* (1836), 9 Yerg. (Tenn.) 209, on p. 236.

¹ For cases in which “heirs” means “children,” see § 616.

² *Goodtitle d. Sweet v. Herring*, 1 East, 264, 278.

³ *Ginger v. White, Willes*, 348, 359.

⁴ *North v. Martin*, 6 Sim. 266. The words if “more children” interpret the words “heirs of the body.”

⁵ *Gummoe v. Howes* (1856), 23 Beav. 184, 186, 190.

⁶ *Jordan v. Adams*, 6 Com. Bench, 748, 9 id. 488.

⁷ *Cf. ante*, §§ 651, 652.

⁸ By Lord Alvanley, in *Poole v. Poole* (1804), 3 Bos. & Pullen, 620, p. 627. For cases in which “issue” has been construed “children,” see *post*, § 675.

tate shall not be sold by the life tenant, but that she shall *have only the use of it*, and on her death to *go to her heirs*, does not exclude the rule.¹ Nor will a direction that the life estate shall be without impeachment of waste prevent the rule from operating.²

§ 660. The meaning which may attach to "heirs of the body" from the context.—The rule in Shelley's case is always applied where the testator has used the words "heirs of the body" in a technical sense to indicate persons who take by descent, and the *prima facie* presumption always is that he has used these words in that sense. But this presumption is not conclusive, and if it shall appear from the will that he has used these words in a different sense, they will not be taken as words of limitation, but as words of purchase, and the rule in Shelley's case will not be applied.

To what extent a limitation to the general heirs, coming after a devise of a remainder in fee to the heirs of the body of the life tenant, shall be permitted to modify the latter words, is a question upon which the cases are not harmonious.³ The English cases have decided that the circumstances that the fee was limited to the *heirs general of the heirs of the body* does not make the words "*heirs of the body*" words of purchase, but that the rule in Shelley's case still applied, and the life tenant took an estate in fee tail.⁴ The American cases in which this

¹ Bishop v. Selleck, 1 Day (Conn., 1804), 299; Carradine v. Carradine, 33 Miss. 698, 727; 1 Preston, 865, 866; Hayes v. Foorde, 2 W. Bl. 698; Fearne, Cont. R. 174.

² Auman v. Auman, 21 Pa. St. 343, 347; 6 Cruise, 353; Roberts on Gavelkind, 96.

³ Cf. ante, § 652.

⁴ Goodright d. Lisle v. Pullin, 2 Ld. Raym. 1437, Stra. 729; Wright v. Pearson (1758), 1 Eden, 119, 125, Amb. 358, 363 (heirs male). See also Fearne on Cont. Remainders, p. 126; Den d. Geering v. Shenton, Cowper, 410. In two of these cases there was a limitation over upon an indefinite failure of issue. It is a general rule that a devise over after a failure of the

issue of the life tenant, whether a definite or an indefinite failure of issue is intended, does not alone prevent the application of the rule in Shelley's case. Kinch v. Ward (1825), 2 S. & St. 411, 417; Measure v. Gee (1822), 5 Barn. & Alderson, 910; King v. King, 12 Ohio, 390, 472; Gonzales v. Barton, 45 Ind. 295, 296. Where land was devised to A., and after his death to his heirs, and on his death without heirs of the body then over, the devise over was rejected, and under the rule in Shelley's case A. took the fee simple absolutely. Ewing v. Barnes, 156 Ill. 61, 40 N. E. R. 325. A devise to a daughter of the testator "free from the control and debts of her husband," but, if

question of the effect of added words limiting the fee, after a gift to the heirs of the body, has arisen, are not harmonious. At first glance the impression produced upon the mind is that the testator means by "heirs of the body," with a limitation over to their heirs general, to *create a new stock of inheritance*. The apparent effect of the words is to show that he meant the children of the first taker, and that he meant *them* to take the fee as purchasers, and when they did die it is to descend to their heirs general. It has been so held in many cases, and the rule in Shelley's case has been repelled where the limitation is to heirs of the body, *their heirs and assigns forever*.¹

The contrary view is well supported; for where property was limited to heirs general of the heirs of the body after a life estate in the ancestor, the rule in Shelley's case has often been applied.² But where, by the express terms of the will, an estate was to go "to A. for life," and then to descend to the heirs of her body and *their heirs and assigns forever*;³ or where the property was devised to A. and his wife for their joint lives, "and then to descend to their heirs jointly and *their heirs and assigns*, or to such as may *then be living*,"⁴ or where the re-

she should die without issue or issue of her children, then to the heir of the testator, does not come under the rule in Shelley's case, and the daughter takes a life estate, remainder in her children, who are meant by issue. *Peirce v. Hubbard*, 31 W. N. C. 185, 152 Pa. St. 18, 25 Atl. R. 231. A devise of leasehold property to J. for life, "with remainder over to the heirs of her body, if she should have any, but, in case she should die without such heirs, then the said remainder to C.," vests the property absolutely in J., though from the clause quoted and another provision the testator's intention to give J. only a life estate is manifest; as the rule in Shelley's case applies as well to leasehold as to freehold property. *Hughes v. Nicklas* (Md.), 17 Atl. R. 398, 70 Md. 484.

¹ *Lillibridge v. Ross*, 31 Ga. 730, where the language of the will was,

"to descend to the heirs of her body, share and share alike, and to their heirs and assigns forever." *Canedy v. Haskins*, 18 Met. (Mass.) 389, 402, 403, where the limitation was to A. for life "and to his eldest male heir, and after his death to said male heirs and assigns forever." And also *Lemacks v. Glover*, 1 Rich. Eq. (S. C.) 141; *Wilson v. Wilcox*, 7 R. L. 515, 517; *Tanner v. Livingston*, 12 Wend. (N. Y.) 83.

² *Brown v. Lyon*, 6 N. Y. (1852), 419, 421; *Brant v. Gelston*, 2 Johns. Cas. (N. Y.) 884; *Schoonmaker v. Sheely*, 8 Denio (N. Y., 1846), 485; *Carter v. McMichael*, 10 Serg. & R. (Pa.) 429; *Paxson v. Lefferts*, 3 Rawle (Pa.), 59; 75 (issue); *George v. Morgan*, 16 Pa. St. 95, 105; *Powell v. Board*, 49 Pa. St. 46, 55.

³ *Brown v. Lyon*, 6 N. Y. (1852), 419, 421.

⁴ *Criswell's Appeal*, 41 Pa. St. 288.

mainder is to the heirs with similar added words, the courts have refused to apply the rule.¹ If the added words are merely a repetition of the previous words of limitation to the heirs, they will be rejected as surplusage;² as, for example, where the language of the testator was to the heirs male of the body, and the heirs male of such issue male. If, however, the added words create a new course of descent, as, for example, in the case of a devise to A. for life, remainder to his heirs, *and to the heirs female of their bodies*, the word "heirs" becomes a word of purchase.³

§ 661. Terms in which "heirs" or "heirs of the body" may be described.—The simplest and most common form of a devise which is within the rule in Shelley's case is that where land is given "to A. for life, remainder to his heirs," or "remainder to the heirs of his body." In the former case the primary taker takes an estate in fee simple by the operation of the rule; in the latter he takes an estate in fee tail, if real property is given; and in either case he takes an absolute interest in personalty. But it is not necessary, in order that the rule shall apply, that the testator shall have designated the heirs by technical words; for if the testator *in fact* means to give a remainder to "heirs," or "heirs of the body," as such, the language he employs is not material. Thus, in the case of a devise to A. for life, *and after his death remainder to his*

¹ A remainder to "heirs begotten of their bodies, and to their heirs and assigns forever," or a remainder to "heirs of the body, share and share alike, equally to be divided, and to their heirs and assigns forever," does not fall under the rule in Shelley's case. *De Vaughn v. De Vaughn*, 166 U. S. 566, 570.

² *George v. Morgan*, 16 Pa. St. 95; *Gibson v. McNeely*, 11 Ohio St. 181; *Burnet v. Coby*, 1 Barn. B. R. 367.

³ And see also cases cited under § 652, *ante*. The supreme court of the United States has recently held that under the law of real property prevailing in the District of Columbia, as declared by the courts of Maryland

and of the District, though the rule in Shelley's case is recognized as one of property, yet, if there are explanatory and qualifying expressions from which it appears that the import of the technical language is contrary to the clear and plain intent of the testator, the former must yield, and the latter will prevail; and where there is a devise to a person for life, with remainder to the heirs begotten of his body, and *their heirs and assigns forever*, the first taker has an estate for life, and his children take an estate in fee by purchase. *De Vaughn v. Hutchinson*, 17 S. Ct. 461, 166 U. S. 566, 570.

issue; ¹ or to A. for life and *to descend to his son or eldest son*; ² or to his eldest *male heir*,³ the rule applies, for these words are read as equivalent to, and synonymous with, "heirs of the body." A devise to A., and to descend to A.'s youngest son, and to the *eldest male heir of said youngest son*; ⁴ a devise to *A. and her descendants*; ⁵ and to *A. and her offspring*; ⁶ to A. and such persons as would be *entitled if he died intestate*; ⁷ to A. and *his legal heirs, or heirs born in wedlock*; ⁸ to A. and *his lawful heirs*; ⁹ or to A. for life, and after his death to be *divided among his heirs* as the law may direct,¹⁰ are within the rule. Though the rule does not apply to a remainder to children,¹¹ with a life estate in the parent, yet if it appears that the testator has used the word "*children*" as equivalent to "*heirs of the body*," and as a word of limitation to take in the whole line of descendants, the rule will be applied, and the parent will take an estate in tail.¹²

¹ Jones v. Jones, 3 N. J. Eq. 236, 239; Gibson v. McNeely, 11 Ohio St. 131, 139; Paxson v. Lefferts, 3 Rawle (Pa.), 59, 75; James' Claim, 1 Dall. 47; Kay v. Scates, 37 Pa. St. 31, 39; Angle v. Brosius, 43 Pa. St. 187, 189 ("legal issue or heirs at his death"); Powell v. Board of Dom. Miss., 49 Pa. St. 46, 55; Kleppner v. Laverty, 70 Pa. St. 70, 72. The American cases in which it has been held that a remainder to issue after a life estate in the ancestor does not create a fee tail in the parent were mostly decided *after* the rule in Shelley's case had been abolished. Daniel v. Whartenby, 17 Wall. (84 U. S., 1872), 639, 645; Lyles v. Digges, 6 Harr. & J. (Md., 1825), 364; Goldsborough v. Martin, 41 Md. 488 (1874); Chelton v. Henderson, 9 Gill (Md.), 432 (1850); Myers v. Anderson, 1 Strobb. (S. C.) Eq. 346; Hancock v. Butler, 21 Tex. (1858), 804. For other cases upon the applicability of the rule in Shelley's case to remainders to issue, see notes under §§ 670, 673.

² Simpers v. Simpers, 15 Md. 160; Mellish v. Mellish, 3 Barn. & Cress. 520, 523, 533, 3 Dow. & Ry. 804; Robinson v. Robinson, 1 Burr. 38; Harvey

v. Towell, 7 Hare, 231, 12 Jur. 242; Tate v. Clark, 1 Beav. 100; Lewis v. Puxley, 16 Mees. & Welsby, 733, 740; Forsbrook v. Forsbrook, L. R. 3 Ch. App. 98, 98. Cf. ante, § 649.

³ Goodrich v. Lambert, 10 Conn. (1834), 449; Fraser v. Chene, 2 Mich. (1851), 91; Brownell v. Brownell, 10 R. I. 509.

⁴ Dennett v. Dennett, 43 N. H. (1861), 499.

⁵ Powell v. Brandon, 24 Miss. (1852), 343.

⁶ Allen v. Markle, 36 Pa. St. (1859), 117; Bramble v. Billups, 4 Leigh (Va.), 90.

⁷ Yarnall's Appeal, 70 Pa. St. 335, 342.

⁸ King v. Rock, 12 Ohio, 390.

⁹ Crockett v. Robinson, 46 N. H., 454.

¹⁰ Kennedy v. Kennedy, 29 N. J. L. (1860), 185.

¹¹ § 662.

¹² Stires v. Van Rensselaer, 2 Bradf. (N. Y.) 172; Haldeman v. Haldeman, 40 Pa. St. (1861), 29, 35; Sheeley v. Neidhammer, 182 Pa. St. 163, 167, 37 Atl. R. 939; McLure v. Young, 3 Rich. (S. C.) Eq. 559; Merryman v. Merry-

On the other hand, if the testator has used the words "heirs" or "heirs of the body" as words of purchase,¹ and as synonymous with "children," the rule will not apply.² Such would also be the case where the remainder is limited to the heirs of the life tenant or to the heirs of his body *living at his death*.³ So, too, a remainder to the heirs and assigns of the life tenant as though she had not been married was held sufficient to take a case out of the rule. The exception which excluded lineal descendants from taking as heirs was certainly sufficient to show that the testator meant the other heirs to take as purchasers.⁴

§ 662. **The rule is not applicable to remainders to children.**—The word "children" is presumptively a word of purchase, not a word of limitation.⁵ In the case of a devise to A. for life, with a devise of a remainder in fee to his children, the word "children," if employed in its ordinary sense, will be a word of purchase, and the rule in Shelley's case will be excluded.⁶ The parent will take a life estate, and the children will take a vested remainder in fee as a class as purchasers. This rule of law and construction is so clear that in most cases its existence is assumed; and though instances of such devises are very numerous, the question whether the rule is applicable to them has seldom arisen.⁷ So also, though the testator has

man, 5 Munf. (Va.) 440; *Parkman v. Bowdoin*, 1 Sumn. C. C. (1833), 359.

¹ See cases cited under § 659.

² *King v. Beck*, 15 Ohio (1846), 559, 562; *Bunnell v. Evans*, 26 Ohio St. (1875), 409, 410.

³ *Dott v. Cunningham*, 1 Bay (S. C., 1795), 453, 455; *Warners v. Mason*, 5 Munf. (Va.) 242. See also *ante*, § 616. A devise to A. "for life, and on his death, if he shall die leaving lawful issue," to the said lawful issue; if one, to him or to her, his or her heirs and assigns forever; but if more than one, to be equally divided among them, their heirs and assigns forever, gives A. an estate tail under the rule. *Powell v. Board of Domestic Missions*, 49 Pa. St. 46, 55.

⁴ *Brookman v. Smith*, L. R. 7 Ex. 305.

⁵ *Ante*, § 546.

⁶ *Ante*, §§ 579, 584.

⁷ *McCroan v. Pope*, 17 Ala. 612; *Van Zant v. Morris*, 25 Ala. 285; *Dudley v. Mallery*, 4 Ga. 52; *Goss v. Eberhart*, 29 Ga. (1859), 545; *Beacroft v. Strawn*, 67 Ill. (1873), 28; *Baker v. Scott*, 62 Ill. 86; *Doe v. Jackman* (1854), 5 Ind. 283, 284; *Ridgeway v. Lanphear*, 99 Ind. (1884), 251, 257; *Helm v. Frisbie*, 59 Ind. 526; *Andrews v. Spurlin*, 35 Ind. 262, 267; *M'Nair v. Hawkins*, 4 Bibb (Ky., 1816), 390; *In re Sanders*, 4 Paige (N. Y.), 293, 297; *Turner v. Patterson*, 5 Dana, 292; *Wight v. Baury*, 7 Cush. 109; *Guthrie's Appeal*, 37 Pa. St. 9; *McKee v. McKinley*, 38 Pa. St. 92; *Gernet v. Lynn*, 31 Pa. St. 94; *Jones v. Cable*, 114 Pa. St. 486, 7 Atl. R. 791; *Affolter v. May*, 115 Pa. St. 54 (1886),

expressly in terms limited a remainder to the *heirs* of the life tenant or to the heirs of his body, if it shall conclusively appear from the context that he used the words "heirs" or "heirs of the body" as meaning "children," the operation of the rule is excluded and the children will take as purchasers under the will.¹

What particular language employed by the testator in connection with a remainder to heirs will show that he has used the word "heirs" as synonymous with "children" is elsewhere fully discussed.² Here it need only be remarked that if the testator directs that on the death of the testator the remainder is to go to his heirs *equally* or in *equal shares*, or if he provides that upon the death of any heirs before the expiration of the life estate the issue of said heir shall receive the parents' share, the presumption is almost irresistible that by the word "heirs" the testator means the children of the life tenant, and the rule in Shelley's case will not apply.³ So, too, where the testator, though giving real property absolutely to his daughters, provided that upon the death of either her share should descend to her children, but that upon the death of either daughter without children the property should go to the survivor, the rule in Shelley's case is not applicable.⁴

8 Atl. R. 20; *Anderson v. Anderson*, 164 Pa. St. 328, 30 Atl. R. 304; *Reeder v. Spearman*, 6 Rich. (N. C.) Eq. 188; *Carrigan v. Drake*, 36 S. C. 354 (1891), 15 S. E. R. 399; *Moon v. Stone*, 19 Gratt. (Va., 1869), 130. See *Stires v. Van Rensselaer*, 2 Bradf. 72.

¹ *Dunn v. Davis*, 12 Ala. 137; *Roberts v. Ogbourne*, 37 Ala. 175; *Underwood v. Robbins*, 117 Ind. 308, 310; *Ridgeway v. Lanphear*, 99 Ind. 251, 257; *Conger v. Lowe*, 124 Ind. 368, 374; *Ellis v. Essex Bridge Co.*, 2 Pick. (Mass.) 243, 247; *Powers v. Porter*, 4 Pick. (Mass.) 198, 254; *Haley v. Boston*, 108 Mass. 575, 579; *Eldridge v. Eldridge*, 41 N. J. Eq. 89, 91; *Den v. Laquear*, 4 N. J. Law, 301, 305; *Wiggins v. Perkins*, 64 N. H. 36, 38; *Bunnell v. Evans*, 26 Ohio St. 409; *Reddish v. Carter*, 32 Ohio St. 1; *Urich v. Merkel*, 81 Pa. St. 332; *ante*, § 616.

² *Ante*, §§ 616, 617, 659.

³ *Bedford v. Jenkins*, 96 N. C. 254, 2 S. E. R. 522.

⁴ *Collins v. Williams*, 98 Tenn. 535, 41 S. W. R. 1056.

"As we understand, one of the principal reasons for establishing the rule was to prevent the abeyance or suspension of the inheritance. The rule, therefore, is only applied to those limitations in which the word 'heirs' is used, on account of the maxim that *nemo est hæres viventis*. But the rule does not apply when the words 'lawful issue,' 'issue,' 'sons' or 'children' are used instead of 'heirs.' These words are regarded as words of purchase, for the reason that they are a designation of persons to take originally in their own right. But when the limitation is to the heirs, it is, in legal intendment, as a class or denomination of persons to take in succession from generation

§ 663. The rule in Shelley's case as applied in equity.—

We have seen that though, as a general rule, equity follows the law in applying the rule in Shelley's case, courts of equity were loth to accept it, where carrying it out would be clearly con-

to generation. 1 Preston on Estates, 265. As Lord Thurlow said in *Brown v. Morgan*, 1 Brown Ch. 216, when the heir takes in the character of heir he must take in the quality of heir, and all heirs taking as heirs must take by descent. Since the solemn determination in *Perrin v. Blake*, in the exchequer, the rule in question has been regarded as one of the most firmly established rules of property, and, strictly speaking, no instance can be adduced of a departure from it. . . . The requisites of the rule are that there must, in the first instance, be an estate of freehold devised; there must be a limitation to the heirs or heirs of the body of the person taking the estate, by that name, and not the heirs as meaning or explained to be 'sons,' 'children,' etc.; that these heirs must be named to take as a class or denomination of persons in succession from generation to generation, and by way of remainder, or at least so that the estate to arise from the limitation to the heirs and the estate of freehold in the ancestor shall both owe their effect to the same deed, will or writing; and that the several limitations shall give interests of the same quality, both legal and equitable. 1 Preston on Estates, 266. . . . That this rule was part of the common law of England, and an established maxim in the law of real property in that realm, for nearly five hundred years, is not, and cannot be, denied." The court then proceeds to show how the rule in Shelley's case had become a part of the law of the commonwealth by the operation of a specified statute, adding: "Here is an emphatic declaration of the peo-

ple, speaking through their representatives in the general assembly, that 'the common law of England, so far as the same is applicable, shall be the rule of decision, and shall be considered in full force until repealed by legislative authority.' . . . The only question, then, must be, Is this rule, which is admitted to be a rule of property of the common law, applicable to our condition,—to the genius and spirit of our institutions? It is said by some courts of great respectability that the rule was established by the courts of England in subserviency to the feudal policy prevailing at that time, and to the interest of the lords, whose feudal rights of relief, wardship, marriage, etc., would not attach upon a transmission by purchase. . . . It has become a rule of property, and is, we believe, in harmony with the genius of our institutions and with the liberal and commercial spirit of our age, which alike abhor the locking up and rendering inalienable real estate, and has challenged and received the willing obedience and support of the most able minds of England and the United States. How many estates may be depending in this state upon this rule we can only conjecture; that there are very many there can be no doubt, which an arbitrary declaration by this court of the inapplicability of the rule to our institutions would unsettle and destroy. The courts of every state of this great Union in which the common law has been adopted have without exception upheld the rule and guided their decisions by it." By the court in *Baker v. Scott*, 62 Ill. 86, 93 et seq.

trary to the intention of the testator. Thus, in construing the limitations in a marriage settlement, equity looked rather to the purpose of the settlor, which was as much to make a provision for the children of the marriage as for the parent, rather than at the technical words. So if property was settled on marriage upon A. for life and the heirs of his body, who would most likely be his children, an estate for life would be decreed to the parent and an estate tail to his eldest son, in order to carry out the manifest intention of the settlor.¹

So also in the case of executory trusts a distinction was made and the rule was not applied. But aside from this, the rule in Shelley's case is applied by courts of equity to the same extent as by the courts of law, though only if the estate in the ancestor and the estate in the heir or heirs are of the same character and quality; *i. e.*, if both estates are legal, or if both are equitable. If the estate limited to the ancestor be a trust estate for his life, and the estate limited to the heirs be a legal estate in fee, the two estates will not coalesce into a fee simple in the ancestor, but the estate in the heirs will be a contingent remainder, and of course they will then take as purchasers.²

Therefore the rule does not apply to a devise in trust of the income of real property made to the children of the testator during their respective lives, and upon the death of each the fee simple of the land to their heirs,³ nor to a devise by which the income of land is to be devoted to the support of A. during his life, with power to apply the principal to his support, and after his death the land to go to A.'s heirs in fee.⁴

¹ Trevor v. Trevor, 1 Eq. Cas. Ab. 387, pl. 7; Streatfield v. Streatfield, Cases Temp. Talb. 176; Bale v. Coleman, 1 P. W. 142.

² Baker v. Scott, 62 Ill. 86; Beacroft v. Strawn, 67 Ill. 28; Zuver v. Lyons, 40 Iowa, 510; Hanna v. Hawes, 45 Iowa, 437, 439, 441; Griffith v. Plummer, 32 Md. 74; Cushing v. Blake, 30 N. J. Eq. 689, 697; Payne v. Sale, 2 D. & Bat. (N. C.) Eq. 453, 457; Armstrong v. Zane, 12 Ohio, 287, 289; In re Hemphill's Estate, 18 Pa. Co. Ct. R. 527, 5 Pa. Dist. R. 690; Little v. Wilcox, 119 Pa. St. 439, 13 Atl. R. 468; In re Gerhard's Estate, 28 Atl. R. 684, 160 Pa. St. 253; Eaton v. Tillinghast,

4 R. L. 276; Bucklin v. Creighton, 18 R. L. 325, 27 Atl. R. 221; Cowing v. Dodge (R. L., 1897), 35 Atl. R. 309; Howard v. Trustees, 41 Atl. R. 156 (R. L., 1898); Austin v. Payne, 8 Rich. (S. C.) Eq. 9; Croxall v. Sherard, 5 Wall. 268; Green v. Green, 23 Wall. (U. S.) 489, 492; Lord Say v. Jones, 3 Bro. P. C. 113; Papillon v. Voice, 2 P. W. 471, 477; Law v. Wilson, 2 T. R. 444; Van Grutten v. Foxwell, 77 L. T. 170, 66 L. J. & B. 745; Fearne, C. R., p. 124; Austin v. Taylor, 1 Eden, 361, Amb. 376.

³ In re Hemphill's Estate, 18 Pa. Co. Ct. R. 527.

⁴ Bucklin v. Creighton, 18 R. L. 325,

Thus, where landed property or a money fund is given in trust to pay the income to several children for their lives, the income to be free from their debts, and on their death the *corpus* to go to their children;¹ or where the trust is then to terminate and the legal title is to go to the heirs of the bodies of the *cestuis que trustent*;² or land is devised in trust for the widow of the testator, and at her death the land is to be equally divided between the heirs of her body,³ a bequest of a fund to be held in a trust for a legatee until he reaches a specified age, and, in case of his death under that age, the money is to be paid to his heirs;⁴ or money is devised in trust for a married woman for her life for her separate use, and after her death to her heirs or issue in fee simple, the rule in Shelley's case does not apply.⁵ But where a trust was for a married woman during her coverture, with a power of appointment of the legal estate in her, and a devise, in default of appointment, to her heirs, it was held that she would take the fee herself.⁶

27 Atl. R. 221. In the very recent case of *Van Grutten v. Foxwell*, 66 L. J. Q. B. 745, App. Cases, 648, 77 Law Times (N. S.), 170, 46 Weekly Reports, 426, an estate was devised in trust to "*permit and suffer*" the child of the testator to receive the rents and profits during his life, and that, on his death, the trustees should continue to stand seized for the benefit of the heirs of the body of the life tenant, the shares of the heirs to be conveyed to them when they should attain the age of twenty-one, the income, in the meantime, to be applied to the maintenance of such heirs in such manner as the trustees should direct. The court held that notwithstanding the use of the words "*permit and suffer*," the legal estate remained in the trustees throughout, and that the rule in Shelley's case is applicable to the legal and to the equitable interest as well.

¹ *Appeal of Reading Trust Co.*, 133 Pa. St. 342 (1890), 19 Atl. R. 552, 26 W. N. C. 9.

² *Edmondson v. Dyson*, 2 Ga. (1847),

307, 320; *Ward v. Saunders*, 3 Sneed (Tenn.), 391.

³ *Settle v. Settle*, 10 Humph. (29 Tenn.) 474.

⁴ *Bennett v. Bennett*, 66 Ill. App. 28.

⁵ *Ware v. Richardson*, 3 Md. (1852), 505; *Gadsden v. Desportes*, 39 S. C. 131, 17 S. E. R. 706.

⁶ *Williams' Appeal*, 83 Pa. St. 377. See also *Ward v. Amory*, 1 Curt. C. C. (1853), 419. The rule in Shelley's case has no application to a bequest to a trustee of a fund to be held by him until the *cestui que trust* reaches a specified age, and, in case of the latter's death before reaching such age, the fund to be paid to his heirs. *Bennett v. Bennett*, 66 Ill. App. 28. The rule in Shelley's case could not apply to a devise to a daughter for her natural life, and at her death to the issue of her body who may then be living, because the estate given to the issue was a legal estate, and that to the daughter an equitable estate; the devise further providing that her life estate should be for her sole and separate use, and appointing trustees

§ 664. **Trusts executory and executed defined and distinguished.**—Before considering the application of the rule in Shelley's case to executory trusts, we must define executory trusts and distinguish them from trusts executed. All active trusts are, in one sense, executory, for something remains in every case for the trustee to do. He must *execute* the duties of his trust. But in the present instance the distinction is one which arises out of the action and the language of the creator of the trust.

If a testator limits an estate in trust in such terms that the trust in its original form is a complete and final expression of the intention of the testator,¹ and nothing remains for the trustee who is thus appointed by the testator to do, except to carry into effect the express directions given him, the trust is executed.² An example of an executory trust is one expressly limited in the will for the payment of the income to a designated person for a particular purpose, as for his support and maintenance. If the testator has named a trustee who is to take the legal title, and who is to apply the income of the fund

to preserve it. *Gadsden v. Desportes*, 39 S. C. 131, 17 S. E. R. 706. Testator devised property in trust to pay the income to his daughter for life, and after her decease "in trust to and for the only proper use, benefit and behoof of such person or persons as would be entitled to the same" by the laws of the state, "if my said daughter had survived her mother and husband, . . . and died intestate, seized and possessed of the said premises, and for such estate and estates as such person or persons would in such case be entitled to by the laws aforesaid." It was held that, because of the exclusion of the husband and mother, the rule in Shelley's case did not apply, and the devise created a valid trust in favor of those entitled in remainder, and it was immaterial that the husband and mother died before the daughter. *In re Dorney's Estate*, 20 Atl.

R. 645; *Appeal of Kuntzleman*, id.; 136 Pa. St. 142, 26 W. N. C. 445.

¹ For other definitions of executed and executory trusts see Lewin on Trusts, pp. 111 et seq.

² The distinction between trusts executed and trusts executory was established in 1705 in *Leonard v. Sussex*, 2 Vern. 526, and affirmed in *Lord Glenorchy v. Bosville*, Cas. Temp. Talb. 3, in 1733. See also *Little v. Wilcox*, 119 Pa. St. 439, 13 Atl. R. 468; *Mullany v. Mullany*, 4 N. J. Eq. 16, 28; *Price v. Sisson*, 13 N. J. Eq. 168; *Cushing v. Blake*, 30 N. J. Eq. 689, 699; *Carradine v. Carradine*, 33 Miss. 698, 729; *Saunders v. Edwards*, 2 Jones' (N. C.) Eq. 134, 137; *Wiley v. Smith*, 3 Ga. 551, 559; *Wood v. Stubbs*, 29 S. E. R. 119 (Ga., 1897); *Livingstone v. Murray*, 67 Barb. (N. Y.) 214, 220; *Wagstaffe v. Lowery*, 23 Barb. (N. Y.) 209, 221; *Wood v. Burnham*, 6 Paige, 513, 26 Wend. (N. Y.) 20; *Carrigan v. Drake*, 36 S. C. 354.

in a particular mode pointed out by him, and the trustee is left no discretion as to the mode or amount of income to be applied, the trust is executed. And it is well settled from the very earliest times that the rule in Shelley's case is to be applied to such trusts to the same extent as it is to legal estates.¹

A trust is said to be executory or directory where the beneficiaries do not take their equitable interests *directly under the will* appointing the trustee, but where something is to be done in the way of a conveyance or transfer of the legal title by the trustee in order that the disposition shall be complete.²

In the case of an executed trust, the testator, having clearly in mind what he intends to do, and how he intends to benefit the *cestui que trust*, has conveyed the legal and equitable interests in terms which are perfect, final and complete.³ His intention is expressed in formal language. The trust is, in consequence, beyond the control of the court, and cannot be moulded or fashioned in any way. In the case of an executory trust, where a plan is to be arranged by the person who is named as a trustee to carry out the intention of the donor, courts of equity do not regard themselves as strictly bound by the rules of the common law, as in the case of an executed trust. In the latter case equity will follow the law. But where the tes-

¹ Carradine v. Carradine, 33 Miss. 698, 729; Tallman v. Wood, 26 Wend. (N. Y.) 9, 20; Livingstone v. Murray, 67 Barb. 214, 220; Edmondson v. Dyson, 2 Ga. 307, 321; Long v. Laming, 2 Burr. 1108; Watts v. Wall, 1 P. W. 109; Preston, Est. 362; Fearne, C. R. 157; Bale v. Coleman, 2 Vern. 670, 1 P. W. 142, 1 Ves. 151; Papillon v. Voice, 2 P. W. 471; Wright v. Pearson (1758), 1 Eden, 125.

² "A trust is executory when it is to be perfected, at a future period, by a conveyance or settlement, as in case of a conveyance to B. in trust to convey to C. It is executed either when the legal estate passes, as in a conveyance to B. in trust or for the use of C., or when only the equitable title passes, as in the case of a conveyance to B. to the use of C. in trust for D." 4 Kent, Comm., pp. 304,

305. "A trust executed is where the party has given complete directions for settling his estate, with perfect limitations; an executory trust is where the directions are incomplete, and are rather minutes or directions for a settlement." Neeves v. Scott, 9 How. (50 U. S., 1850), 211. However, a mere direction to convey the legal title, where the limitations of the trust are complete, does not alone make the trust an executory trust. Egerton v. Lord Brownlow, 4 H. L. C. 1210; Cushing v. Blake, 30 N. J. Eq. 689, 700; Rowan v. Chase, 94 U. S. (1876), 818; Phipps v. Ackers, 9 Cl. & Fin. 583, 594, 599, 601; Earl Stamford v. Hobart, 3 B. P. C. Toml. 31; White v. Carter, 2 Eden, 366, Ambler, 670; Roberts v. Dixwell, 1 Atk. 607.

³ Wiley v. Smith, 3 Ga. 551, 559.

tator has seen fit to state his intentions in general and vague expressions, which are usually informal and sometimes improper, leaving the particular mode in which these intentions are to be carried out to the discretion of his trustee, the court of equity will take the matter into its own hands, and will decree a conveyance or settlement according to the general purpose and intention of the testator. The terms in which the trust is limited are not taken in a technical sense, but are merely considered in the nature of *memoranda*, or general instructions for a fiduciary disposition, to be further elaborated in its details at a future time by the trustee.¹

Under these circumstances courts of equity, in decreeing a conveyance or a settlement of a trust estate, do not regard themselves as bound by the rule in Shelley's case, but will strive to carry out the intention of the testator;² for, in construing words by which an executory trust is created, the court "exercises a large authority in subordinating the language to the intent."³ This equitable doctrine has been applied in England to a very numerous class of cases in which marriage settlements have been involved.⁴

Thus, in the case of a marriage settlement, the evident purpose of the settlor is to provide for the children of the marriage, if any there shall be. This fact furnishes an indication of an intention which is not always present in wills. Such being the

¹The distinction between executory and executed trusts is approximately illustrated by the analogous case of the general instructions given by a testator to his professional adviser for the drafting of his will, and the will when it is completed. The testator may employ the ordinary non-technical language of the layman who is not conversant with legal phraseology, and may depend upon the draftsman to state his intention formally and technically. The draftsman, like the court of equity in construing an executory trust, understands thoroughly the testator's intention, though it has been stated in terms which, taken in their strict sense, convey an entirely different

meaning. It is then the duty of the draftsman to disregard the particular language of the testator, and so to frame the will in appropriate and technical terms that the real, and not the apparent, intention of the testator may be carried out.

²See cases cited in § 663.

³Lord Westbury in *Sackville-West v. Holmesdale*, L. R. 4 H. L. 543.

⁴The distinction between the two classes of trusts is said by Lord Hatherly, in *Sackville-West v. Lord Holmesdale*, L. R. 4 H. L. 543, on page 565, to have had its origin in a device to avoid the operation of the extremely technical doctrine of the rule in Shelley's case.

evident intention of the person making a settlement, no reason exists why his legitimate intention should be defeated because the actual and formal agreement of the parties made in writing is that the estate is to be limited to the father for life, with a remainder to the heirs of his body. Where the settlement is made in such terms, the rule in Shelley's case, applied to the strict language of the instrument, would give the parent (the father) an estate in fee tail, which he might convey to the exclusion of the issue of the marriage. Hence, courts of equity have uniformly decreed a strict settlement under such an agreement by which the property is limited to A. for his life, with a remainder to his children as purchasers. But in the case of a will, the intention of the testator can only be ascertained from the will; and while, in the case of a devise to A. for life, and after his death to his issue or children, it *may* be the intention to benefit the children as purchasers, there is no presumption one way or the other. If, however, the executory trust is created by a will, and it appears that the words of the testator are not used in a strict sense, the court will frame a trust to carry out his intention.¹

§ 665. **Executory trusts in wills.**—Although a court of equity may presume, in the case of a marriage settlement, that

¹In *Blackburn v. Stables*, 3 V. & B. (1814), 367, on page 369 the court said: "I know of no difference between an executory trust in marriage articles and in a will, except that the object and purpose of the former furnish an indication of intention which must be wanting in the latter. When the object is to make a provision by the settlement of an estate for the issue of a marriage, it is not to be presumed that the parties meant to put it in the power of the father to defeat that purpose and to appropriate the estate for himself. If, therefore, the agreement is to limit an estate for life, with remainder to the heirs of the body, the court decrees a strict settlement in conformity to the presumable intention; but if a will directs a limitation for life, with remainder to the heirs of the body, the court has no such ground for de-

creeing a strict settlement. A testator gives arbitrarily what estate he thinks fit. There is no presumption that he means one quantity of interest rather than another,—an estate for life rather than in tail or in fee. The subject being mere bounty, the intended extent of that bounty can be known only from the words in which it is given; but, if it is clearly to be ascertained from anything in the will that the testator did not mean to use the expressions, which he has employed, in their strict, proper, technical sense, the court in decreeing such settlement as he has directed will depart from his words in order to execute his intention; but the court must necessarily follow his words unless he has himself shown that he did not mean to use them in their proper sense."

the creator of the equitable estate desired only to give the parent a life estate, no such presumption can invariably be indulged in the case of a will. Thus, where land was devised to trustees and their heirs, with a direction to settle it on the two sons of the testator and the heirs of their bodies, with a remainder over, "taking special care in the settlement that it *should not be in the power of either son to dock the entail given him during life*," the court decided that a settlement giving the sons an estate for life only should be decreed, as otherwise they would have power to bar the estate in tail.¹ So also, where a testator directed trustees to convey land for the separate use of his daughter for life, *so that her husband should have no benefit*, with a remainder, on her death, to the heirs of her body in trust, the court, by Lord Hardwicke, refused to apply the rule in Shelley's case to the remainder, for to do so would permit the husband to claim by the right of curtesy.² If the trustees are directed to settle an estate on A. and the heirs of his body, so that if he should die without leaving issue the property may *descend unincumbered* to B.,³ or if a direction is inserted that a settlement is to be made on A., and the heirs of his body or issue in tail are to "take in succession and priority of birth," and "the estate is to be settled as *counsel shall advise*," a strict settlement will be decreed.⁴

By some of the cases a distinction is made between a devise directing the trustees of a fund to *purchase land and to settle it themselves*, and a devise in trust of money to *purchase land to be held* on trusts that the testator points out. In the former case the trust, being *wholly* executory, and its limitations being wholly left to the discretion of the trustees, does not call for the application of the rule in Shelley's case. But in the latter case, the testator having been his own conveyancer, the court will apply the rule under consideration, and a strict settlement for life, with a remainder to the heirs, will not be decreed.⁵

¹ Leonard v. Sussex (1705), 2 Vern. 526, 527. See also Papillon v. Voice, 2 P. W. 471, 478.

² Roberts v. Dixwell (1739), 1 Atk. 607, 609; Parker v. Bolton, 5 L. J. (N. S.) Ch. 98.

³ Thompson v. Fisher, L. R. 10 Eq. 207, 209.

⁴ White v. Carter (1766), 2 Eden, 866, 868, Amb. 670.

⁵ Austin v. Taylor, 1 Eden (1758), 861, 869, Amb. 376. See also East v. Twyford, 9 Hare, 713, 733, 4 H. L. 517; Franks v. Price, 3 Beav. 182.

On the other hand, there are very many cases in which this distinction is repudiated, and the trust is regarded as executory, even where the testator has in detail pointed out the limitation of the estate which he intended.¹

But it has been held that, although the trust is wholly executory in so far as the testator has directed his trustees to purchase land, and to convey it as pointed out by him, if he has expressly, in terms technically correct, directed that the land shall be settled as an estate in fee simple, or an estate in tail, the court has no right to interpose merely because a conveyance is directed and decree a strict settlement.² The reasons against interference in such cases are very strong where the trust contains no express limitation for life, and no limitation to a trustee to preserve contingent remainders, and no clause barring impeachment for waste, or directing that the devisee shall *not* bar the entail.³ The rule distinguishing between executory trusts, and the principles of equity which exempt such trusts from the application of the rule in Shelley's case, are generally applicable in the states of the American Union.⁴ Thus, a devise in trust, the trustee to convey to A. for life, with a remainder to his right heirs forever, has been held to give A. an estate for life, with a contingent remainder to his heirs.⁵

¹ *Harrison v. Naylor*, 2 Cox, 247, 251.

² *Cushing v. Blake*, 30 N. J. Eq. 689, 700.

³ *Blackburn v. Stables*, 2 Ves. & B. 367, 369; *Marshall v. Bousfield*, 2 Mad. 166.

⁴ See cases cited in note 2, p. 896.

⁵ *Wood v. Burnham*, 6 Paige (N. Y.), 573, 578, 26 Wend. 9, 20. In the case of *Lord Glenorchy v. Bosville*, Cases Temp. Tal. 3, the devise was to trustees in fee to receive rents and profits and pay them to A. until her marriage, and to pay the debts out of the residue, and after their payment to hold in trust for A. until her marriage, and on that event to convey it to her for her life, without impeachment of waste, remainder to her husband for life, remainder to her issue."

The court held that though, if it had been an immediate devise to A. and her issue, A. would have taken an estate tail, yet, being executory, it must be executed in a more careful manner so as to more closely fulfill the intention of the testator. A conveyance to A. for life, remainder to her husband for life, remainder to her first and every other sons, remainder to the daughters, was ordered. So, in *Shelton v. Watson*, 16 Sim. 542, where the testator directed "an estate to be purchased and made hereditary and settled upon my here constituted heir, and to descend to his heir, or dying without issue as I shall now provide, and I hereby constitute W. S. my heir and successor, and the said estate when purchased to be settled on him, his heirs and

§ 666. The rule in Shelley's case in the United States.—The rule in Shelley's case, forming, as it does, a constituent part of the English common law, was adopted by the courts of the thirteen colonies, and, upon their becoming states of the American Union, the rule was re-affirmed in the respective state courts. It is still a part of the American common law, except so far as it has been expressly abolished or modified by statute.

It seems to be no objection to the operation of the rule that it was wholly of feudal origin, and that the conditions which in England caused its creation and demand its application have not at any time existed in America. Most of the rules of the American law of real property not enacted by statute are of feudal origin, and, while such rules have been repealed or modified, to make the American law of real property conform to the new and peculiar conditions of society which exist in America, this rule is still a part of the common law in all cases where it has not been expressly repealed.¹

But the legislatures of very many of the states,² having in view not so much its English origin as the fact that in most cases it nullifies the intention of the testator, have abolished the rule by statute. In the majority of cases these statutes are

successors in the male line, lawfully begotten. And in case W. S. die without issue then a similar settlement to be made on his two brothers, but the estate shall never pass out of his name and family," the court held that W. S. and his brothers took life estates.

¹Hamilton v. Hempstead, 3 Day (Conn., 1809), 332; Welles v. Olcott, 1 Kirby (Conn., 1786), 118; Choice v. Marshall, 1 Kelly (Ga., 1846), 97; Brislain v. Wilson, 63 Ill. 173, 175; Andrews v. Spurlin, 35 Ind. (1870), 262, 264; Brown v. Alden, 14 B. Mon. (Ky.) 143; Johnson v. Johnson, 2 Met. (Ky.) 331; Lyles v. Diggs, 4 Har. & J. (Md., 1818), 431; Griffith v. Plummer, 32 Md. (1869), 77; Fulton v. Harmon, 44 Md. (1875), 251, 257; Davis v. Hayden, 9 Mass. (1813), 514; Steel v. Cook, 1 Metc. (Mass.) 281; Fraser v. Chene, 2 Mich. (1851), 81; Powell v. Brandon,

24 Miss. (1852), 343, 361; Dennett v. Dennett, 43 N. H. 499, 502; Den v. Baldwin, 21 N. J. L. 395, 400; Stires v. Van Rensselaer, 2 Bradf. (N. Y.) 172; Cipperly v. Cipperly, 40 How. Pr. (N. Y.) 269; Post v. Post, 47 Barb. (N. Y.) 72, 90; Brown v. Lyon, 6 N. Y. (1852), 419; Armstrong v. Zane, 13 Ohio (1843), 287, 290; Cooper v. Coursey, 2 Coldw. (Tenn.) 416; McFeely v. Moore, 5 Ohio, 465, 466 (1832); Allen v. Markle, 36 Pa. St. (1859), 117; Steiner v. Kolb, 57 Pa. St. 123; Quillman v. Custer, 57 Pa. St. (1868), 125; Ives v. Harris, 7 R. I. 413; Hinson v. Pickett, 1 Hill (S. C.), 37; Polk v. Faris, 9 Yerg. (Tenn.) 209, 231; Brooks v. Evetts, 33 Tex. 742; Giddings v. Smith, 15 Vt. (1843), 344; Bramble v. Billups, 4 Leigh (Va., 1832), 90; 2 Wash. R. P. 274; Willard, R. E. 166; 2 Bouvier's Inst. 290; 4 Kent, Com. 502.

²See post, § 667.

applicable both to wills and to deeds; but some of them are applicable to wills alone.

In some of the states the rule still exists as a rule of the law of real property. This is the case in the District of Columbia,¹ Illinois,² Indiana,³ Iowa,⁴ Maryland,⁵ Pennsylvania,⁶ South Car-

¹ But in this jurisdiction the Supreme Court of the United States has held that the rule in Shelley's case must yield to the clear and plain intent of the testator expressed to the contrary. *De Vaughn v. Hutchinson*, 17 S. Ct. 461, 166 U. S. 566, 570; *De Vaughan v. De Vaughan*, 3 App. C. 50; *Sims v. College*, 1 App. D. C. 72.

² *Baker v. Scott*, 62 Ill. 86; *Brislain v. Wilson*, 63 Ill. 173, 175; *Beacroft v. Strawn*, 67 Ill. 28; *Butler v. Heustis*, 68 Ill. 594; *Belslay v. Engel*, 107 Ill. 182; *Vangieson v. Henderson*, 150 Ill. 119, 36 N. E. R. 974; *Hagemann v. Hagemann*, 21 N. E. R. 814, 129 Ill. 164. In this state the rule in Shelley's case has been applied to a devise to A. and his heirs, subject to a power of sale to be exercised by A. for his support (*Ryan v. Allen*, 120 Ill. 648, 12 N. E. R. 65); to A. and B. in fee, to be equally divided on the death of either without issue (*Silas v. Hopkinson*, 41 N. E. R. 1013, 158 Ill. 386), and also to a man and his heirs, and, on his death without heirs of his body, then over to another. *Ewing v. Barnes*, 156 Ill. 61, 40 N. E. R. 325. An express declaration of the testator showing an intention to the contrary does not restrict the application of the rule. *Van Olinda v. Carpenter*, 127 Ill. 42, 19 N. E. R. 868.

³ *Small v. Howland*, 14 Ind. 592; *Hull v. Beals*, 25 Ind. 25; *Andrews v. Spurlin*, 35 Ind. 262, 264; *Stilwell v. Knopper*, 69 Ind. 558, 1 Am. Pro. R. 211; *Perkins v. McConnell*, 136 Ind. 384, 36 N. E. R. 121; *McIlhinny v. McIlhinny*, 137 Ind. 411; *Lane v. Utz* (Ind., 1897), 29 N. E. R. 772. The rule is in force as law in this state,

though it will not be allowed to overcome the intention of the testator clearly expressed. *Ridgeway v. Lanphear*, 99 Ind. 251, 255; *Allen v. Craft*, 109 Ind. 476, 479, 9 N. E. R. 919; *Earnhardt v. Earnhardt*, 127 Ind. 397, 398, 26 N. E. R. 895. Where a remainder is given on the death of the life tenant without heirs of the body (*Granger v. Granger* (Ind., 1896), 44 N. E. R. 189), or where the testator expressly provides that the property shall go to such persons as would have taken the same had the life tenant owned it in fee simple, but that the devise shall only vest in him a life estate and nothing more, the rule does not apply. *Earnhardt v. Earnhardt*, 26 N. E. R. 895, 127 Ind. 397, 398.

⁴ *Kiene v. Gmehle*, 85 Iowa, 312, 316, 52 N. W. R. 232; *Pierson v. Lane*, 14 N. W. R. 90, 60 Iowa, 60. Subject to an expression of a contrary intention on the part of the testator. *Kiene v. Gmehle*, 85 Iowa, 87, 89; *Hambel v. Hambel*, 75 N. W. R. 673 (Iowa, 1898); *Zavitz v. Preston*, 96 Iowa, 52, 64 N. W. R. 668; *Wescott v. Binford*, 74 N. W. R. 18.

⁵ *Ware v. Richardson*, 8 Md. 505; *Griffith v. Plummer*, 32 Md. 74; *Thomas v. Higgins*, 47 Md. 439. In this state it has been expressly held that the rule applies to leasehold property. *Horne v. Lyeth*, 4 H. & J. (Md.) 431; *Seeger v. Leakin*, 76 Md. 500, 25 Atl. R. 862; *Hughes v. Nicklas*, 17 Atl. R. 398, 79 Md. 484.

⁶ *Findlay v. Riddle*, 3 Binn. (Pa.) 139, 159 et seq.; *Eliot v. Pearsoll*, 8 W. & S. (Pa.) 38, 39; *Guthrie's Appeal*, 37 Pa. St. 9, 21; *Auman v. Auman*, 21 Pa. St. 343, 347; *Bassett v. Hawk*, 118

olina,¹ Texas² and Vermont,³ where the rule in Shelley's case is recognized as a part of the law of real property.

§ 667. Statutes abolishing the rule in Shelley's case in the United States.—In the majority of the American commonwealths the rule in Shelley's case has been expressly re-

Pa. St. 94, 11 Atl. R. 802; *Little v. Wilcox*, 119 Pa. St. 439; *In re Dorney's Estate*, 20 Atl. R. 645, 136 Pa. St. 142, 26 W. N. C. 445; *Yarnall's Appeal*, 70 Pa. St. 335; *Hiestor v. Yerger*, 31 Atl. R. 122, 166 Pa. St. 445; *Sheely v. Neidhammer*, 182 Pa. St. 163, 167, 37 Atl. R. 939. It has been held in Pennsylvania that the rule in Shelley's case may yield to the intention of the testator. *Gerhardt's Estate*, 160 Pa. St. 253, 28 Atl. R. 684; *Little's Appeal*, 117 Pa. St. 14, 11 Atl. R. 520. And also that where the testator gives a life estate to the parent, with a remainder to the children, and there are no children living at the date of the death of the testator, the rule does not apply. *Pierce v. Hubbard*, 25 Atl. R. 231, 152 Pa. St. 18, 31 W. N. C. 185. Nor does the rule apply in Pennsylvania where the devise is to A. for his life, with a power of appointment by will or deed amongst his sons, and a remainder in default of appointment to "the sons and daughters of A. and to their heirs and assigns forever." The sons and daughters take as purchasers. *McDonald v. Dunbar*, 88 Pa. St. 553.

¹ *Corrigan v. Drake*, 15 S. E. R. 359, 36 S. C. 354; *Gadsden v. Desportes*, 39 S. C. 131, 17 S. E. R. 706; *Dott v. Cunningham*, 1 Bay (S. C.), 453; *Simms v. Buist* (S. C., 1898), 30 S. E. R. 400; *Carr v. Porter*, 1 McCord, Ch. (S. C.) 60.

² *Hawkins v. Lee*, 22 Tex. 545.

³ The rule is subject in Vermont to an expression of contrary intention on the part of the testator. *Blake v. Sloane*, 27 Vt. 475, 476; *Smith v. Hastings*, 29 Vt. 240, 242. See also *Ford v. Flint*, 40 Vt. 382; *In re Kelso*, 69

Vt. 272, 274, 37 Atl. R. 747; *In re Wells* (Vt., 1897), 38 Atl. R. 83.

"This question seems to involve to some extent the rule in Shelley's Case, 1 Coke, 93. This question was somewhat examined in a late case, *Blake v. Stone*, 27 Vt. 475. It was there considered that the rule in Shelley's case was to be regarded as of no special force in this state, except as one of construction and intention. This was the view taken of the same rule in England by Lord Mansfield and Justice Wilmot in *Doe v. Laming*, 2 Burrows, 1100, and by Justice Blackstone in *Blake v. Perrin*, 4 Burrows, 2579. This is that celebrated case so long pending in the king's bench and exchequer chamber upon the extent of the rule in Shelley's case, that when the ancestor by any conveyance takes an estate for life, with remainder mediately or immediately to his heirs, in fee or in tail, the estate shall vest absolutely in the first grantee or devisee, and no estate remain which is secured by the deed to the heirs: in other words, the term 'heirs' in such case is to be regarded as one of limitation, and not of purchase. The court here were so divided that the case was not decided. And the amount of discussion and acrimonious controversy which ensued upon the subject is almost incredible. And Lord Campbell says in his *Life of Lord Mansfield* that even to this day nothing will so readily provoke debate among English lawyers as to start the query whether *Perrin v. Blake* was rightly decided by the king's bench. But it seems to have been held in England that when the language of the instrument mani-

pealed by statute. Such is the case in Alabama,¹ California,² Connecticut,³ Dakota,⁴ Delaware,⁵ Georgia,⁶ Kansas,⁷ Kentucky,⁸ Montana,⁹ Maine,¹⁰ Massachusetts,¹¹ Michigan,¹² Mississippi,¹³ Missouri,¹⁴ Minnesota,¹⁵ New Hampshire,¹⁶ New Jersey,¹⁷ New

York, &c. It is not necessary to repeat a clear intention to have the estate pass to the heirs, and that the ancestor should take only a life estate, it should be allowed to have that operation, certainly where this is unquestionably so expressed. It is indeed held in England that all doubts shall in such case be solved against such construction. But this extreme rule of construction in favor of the absolute right of the ancestor to alien the property is obviously a rule of policy merely, and has been supposed to derive its chief support from considerations having their origin in the feudal tenures of the realm. But here no such considerations can have weight. And as our system of conveyancing is statutory, there is no necessity and no reason in adopting any rule of construction which will tend to carry us one side of the true purpose and intention of the instrument. And this, says Professor Greenleaf, 2 Cruise, 381, 'was deemed by the late lamented Judge Story to be generally adopted in the United States, where the subject was not regulated by statute.' See also 4 Kent's Com. 215, 223."

¹ Code 1876, § 2183. See *Powell v. Glenn*, 21 Ala. 458; *Holt v. Pickett* (Ala., 1896), 20 S. R. 432.

² Civ. Code, §§ 779, 1835.

³ *Bishop v. Selleck*, 5 Conn. 300; R. S., p. 352, § 2953.

⁴ Comp. L. 1887, § 8361.

⁵ *Daniel v. Whartenby*, 17 Wall. 639.

⁶ Code 1862, 1821, §§ 2248, 2249, 2250; *Choice v. Marshall*, 1 Ga. 97; *Dudley v. Mallery*, 4 Ga. 52, 64; *Georgia, C. & N. Ry. Co. v. Archer*, 13 S. E. R. 630, 87 Ga. 237; *Wilkerson v. Clark*, 80 Ga. 367, 7 S. E. R. 319.

⁷ Repealed as to wills only. Revision of 1868, ch. 117, § 52; Gen. St. 72; *Bunting v. Speck*, 41 Kan. 424, 425.

⁸ R. S., ch. 80, § 10; *Feltman v. Butts*, 8 Bush, 115; *Riggins v. McClellan*, 28 Mo. 23; *Montgomery v. Montgomery* (Ky.), 11 S. W. R. 506.

⁹ As to wills only. Comp. St. 1887, § 492, p. 389.

¹⁰ R. S., ch. 73, § 6; *Pratt v. Leadbetter*, 38 Me. 9; *Buck v. Paine*, 75 Me. 582, 589; *Hamilton v. Wentworth*, 58 Me. 101.

¹¹ *Davis v. Hayden*, 9 Mass. 514; *Loring v. Elliott*, 16 Gray, 568; *Steele v. Cook*, 1 Met. 281; *Putnam v. Gleason*, 99 Mass. 454; Gen. St. 1860, p. 466; St. 1791, ch. 60, § 3; R. S., ch. 59, § 9.

¹² *Gaukler v. Moran*, 66 Mich. 353, 33 N. W. R. 513; R. S., § 5544, and Comp. L. 1871, p. 1327.

¹³ As to real, but not as to personal, property. Code 1880, § 1291; *Powell v. Brandon*, 24 Miss. 343, 361; *Hampton v. Rather*, 30 Miss. 193, 203; *Harris v. McCann*, 23 S. R. 631, 63 Miss. 98.

¹⁴ *Tesson v. Newman*, 62 Mo. 198.

¹⁵ Gen. St. 1891, § 3985.

¹⁶ As to wills only. Gen. Laws, ch. 193, 1875, p. 455, § 5; *Sanborn v. Sanborn*, 62 N. H. 631; *Dennett v. Dennett*, 43 N. H. 500; *Cloutman v. Bailey*, 62 N. H. 44.

¹⁷ Statute 1821, Revision, p. 299, § 10. The rule is abolished only so far as it relates to lineal heirs of the devisee. If land is devised to A., remainder to his heirs, A. takes an estate in fee only if he shall die without lineal heirs. *Lippincott v. Davis* (N. J.), 28 Atl. R. 587; *Cushing v. Blake*, 30 N. J. Eq. 689, 697; *Den v. Baldwin*, 21 N. J. L. 395, 400.

York,¹ North Carolina,² Ohio,³ Rhode Island,⁴ Tennessee,⁵ Virginia,⁶ Washington,⁷ West Virginia⁸ and Wisconsin.⁹

§ 668. The rule in Shelley's case applied to personal property.—The rule is as applicable to personal property as it is to real property. If the testator bequeaths chattels real, as an estate for years, to A. for life, remainder to his heirs or heirs of his body,¹⁰ or personal property of any description upon similar limitations,¹¹ A. will take an absolute interest by the operation of the rule, whether the limitation in remainder was to his heirs or the heirs of his body. The principle of the rule also applies where an estate in a term of years is given to A. for life and to his executors. He takes the full term absolutely for an executor bears the same relation to his testator in respect to the personal property as the heir does to his ancestor in respect to real property.¹²

§ 668a. The general effect and the practical operation of the rule in Shelley's case.—Where the rule in Shelley's case is recognized to be in force as a part of the law of real prop-

R. S. 725, § 28; *Moore v. Littell*, 41 N. Y. 66; *Chrystie v. Phyfe*, 19 N. Y. 344, 353.

² Code, § 1829; *Bedford v. Jenkins*, 96 N. C. 254, 2 S. E. R. 522; *Leathers v. Gray*, 101 N. C. 162, 7 S. E. R. 657; 96 N. C. 548, 23 S. E. R. 455; *Crawford v. Wearn*, 115 N. C. 540, 20 S. E. R. 724; *Chamblee v. Broughton*, 120 N. C. 170, 27 S. E. R. 111.

³ R. S. 1854, ch. 122, § 5968; *Carter v. Reddish*, 32 Ohio St. 1; *King v. King*, 12 Ohio, 390, 472; *Armstrong v. Zane*, 12 Ohio, 287, 299.

⁴ *Lippitt v. Huston*, 8 R. L. 415; Pub. St. R. L., ch. 182, § 2, in 1798-90; *Andrews v. Lothrop*, 17 R. L. 60, 20 Atl. R. 97; *Bucklin v. Creighton*, 18 R. L. 325, 27 Atl. R. 221; *Petition of Browning*, 16 R. L. 441, 16 Atl. R. 717; *Boutelle v. City Sav. Bank*, 18 R. L. 177, 26 Atl. R. 53; *Cooper v. Cooper*, 6 R. L. 261.

⁵ Code 1858, § 2008; Mill. & Bert. Code, § 2514; *Hurst v. Wilson*, 89 Tenn. 270, 4 S. W. R. 778; *Polk v. Faris*, 9 Yerg. (Tenn.) 209, 241.

⁶ Code, § 2423; *Roy v. Garnett*, 2 Wash. (Va.) 9; *Moore v. Brooks*, 13 Gratt. (Va.) 135.

⁷ As to wills only. Hill, Ann. Code, § 1473, p. 514.

⁸ Code 1891, ch. 71, § 11.

⁹ R. S., ch. 95, § 2052.

¹⁰ 4 Kent, 223; *Horne v. Lyeth*, 4 H. & J. (Md.) 431; *Seeger v. Leakin*, 76 Md. 500, 25 Atl. R. 862; *Hughes v. Nicklas*, 17 Atl. R. 398, 70 Md. 484.

¹¹ *Powell v. Brandon*, 24 Miss. 343, 361; *Hampton v. Rather*, 30 Miss. 193, 203; *Kay v. Kay*, 4 N. J. Eq. 495, 502; *Dott v. Cunningham*, 1 Bay (S. C.), 453; *Polk v. Faris*, 9 Yerg. (Tenn.) 209, 241; *Atkinson v. Atkinson*, 3 P. W. 258; *Fearne, C. R.* 463; *Daw v. Lord Chatham*, 1 Madd. 488; *Chandos v. Price*, 3 Ves. Jr. 99.

¹² Co. Lit. 54 B; *Kirkpatrick v. Capel*, Sugden on Powers, p. 75; *Holloway v. Clarkson*, 2 Hare, 521, 526 (money legacy); *Page v. Soper*, 11 Hare, 321, 324; *Devall v. Dickens*, 9 Jur. 550.

erty, those persons who, at the death of the tenant for life, are *his* heirs, take the fee by descent from him, and not as purchasers under the will by which the life interest is given. The person or persons who thus take the fee as heirs by descent take it subject to the dower of the widow of the ancestor, unless she has relinquished her dower therein. And where the ancestor was a woman, her heirs who take by descent from her under the rule in Shelley's case take subject to her husband's right of curtesy. These rules giving the widow her dower, and the husband his curtesy, are applicable whether the estate in the ancestor was legal or equitable.¹

Where the heirs or the heirs of the body of the primary devisee take by descent from their ancestor under the rule, and not as purchasers under the will, and the ancestor dies in the life-time of the testator, his heirs or the heirs of his body take nothing, though they survive the testator. They cannot, by reason of the rule, take as purchasers under the will in which an estate is given their ancestor, and they cannot take by descent from their ancestor, as, independently of statute, the devise to their ancestor has lapsed by his death before that of the testator has taken place.² But where the rule in Shelley's case has been abolished, the death of the ancestor to whom the life estate, remainder to his heirs, has been given does not affect the interest which his heirs will take if they survive the testator. When the ancestor survives the testator, the remainder to his heirs is contingent until his death; but when the ancestor dies in the life-time of the testator, the remainder to them is accelerated, and becomes a vested interest in those of his heirs who survive the testator, and they take as purchasers an immediate estate under the will. Again, in those jurisdictions where the rule in Shelley's case is recognized as law, and where, by its operation, the primary devisee takes the fee, he has the absolute power of alienating it by sale, mortgage or otherwise. His heirs, taking by descent and not by purchase, are estopped to assert their rights as against his conveyance of the fee; or rather, as *nemo est hæres viventis*, they *have no rights until his death*; and, if he is then not in possession of the fee simple, there is nothing to which their rights as

¹ *Post*, § 714.

² *Ante*, § 324 et seq.

heirs taking by descent can attach; while on the other hand, if the heirs take a remainder in fee as purchasers after a life estate in the ancestor, no act of the latter can affect the heirs, except so far as a forfeiture of the life estate would at common law, independently of the statute, destroy the contingent remainder. As regards the effect of the rules upon estates tail, it need only be said here that, where by its operation the first taker is created a tenant in fee tail, he may, independently of statute, alien the fee tail by suffering a common recovery, which will bar the heirs of his body, and will destroy all contingent remainders limited after the estate tail.

CHAPTER XXXIV.

THE WORD "ISSUE" AS A TERM OF PURCHASE AND OF LIMITATION.

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| <p>§ 669. Whether the word "issue" is a word of limitation or a word of purchase.</p> <p>670. A devise to "A. and his issue" creates an estate tail.</p> <p>671. The effect of added words of inheritance in modifying a gift of a remainder to issue.</p> <p>672. The addition of words of distribution to a devise to issue—Issue may take as tenants in common.</p> <p>673. A devise to "A. for life, and then to his issue," converted</p> | <p>into a fee tail by the rule in Shelley's case.</p> <p>§ 674. Definition and construction of the word "issue" when it is a word of purchase.</p> <p>675. The restriction of the word "issue" to children as purchasers.</p> <p>676. Mode of distribution among issue as purchasers.</p> <p>677. Meaning of the word "descendant."</p> <p>678. Mode of distribution among descendants.</p> |
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§ 669. Whether the word "issue" is a word of limitation or a word of purchase.—The character of the word "issue," whether it shall be regarded as a word of limitation, describing the quantity of an estate which is given, or whether it shall be taken as a word of purchase, creating independent interests under the will, has been the subject of much discussion. In a case decided by him Lord Kenyon¹ said: "In a will, 'issue' is either a word of purchase or of limitation, as will best suit the intention of the devisor; though in the case of a deed, it is universally a word of purchase."

Though some of the cases state that *primarily the word "issue" signifies "heirs of the body,"* and is consequently a word of limitation, it does not seem that there is any presumption one way or the other. For example, if a man devises land for *life to A., with a remainder to his issue*, there is nothing to show, admitting that "issue" is equivalent to the words "heirs of the body," that the testator intends the issue of A. to take by descent from the ancestor, rather than as purchasers under his will. But if the testator devised *land to A.*

¹ In *Doe d. Cooper v. Collis*, 4 T. R. 294, 299.

and his issue, it is a very fair presumption that by "issue" he meant "heirs of the body," and that those who are to take as issue, are to take by descent from the ancestor mentioned. The testator did not in such event mean that the ancestor was to take a life estate, and that on his death the interest in the fee was to go to the issue, *i. e.*, to descendants of all degrees of relationship, but that the ancestor was to take an estate tail,¹ which on his death was to descend to the heirs of his body.

The word "issue," at least in a will, is not a technical word like "heirs of the body;" and hence, if the testator has indicated an intention to use it in any other sense than as a word of limitation, his intention must be respected. For we should bear in mind that even such technical and exact words as "heirs," or "heirs of the body," may, if shown by the context to be descriptive of persons rather than words of limitation, be taken as words of purchase, pointing out the persons whom the testator intended to take directly under his will.² But in all such cases the intention of the testator to use the words in any other than their ordinary sense must be shown from the language of the will.

§ 670. A devise to "A. and his issue" creates an estate tail.—A devise to *A. and his issue, simply*, with nothing more in the context to show whether A. and the issue are to take concurrently or in succession, or what interest the issue are to take, will undoubtedly give A. an estate in fee tail.³ The word "issue" will be taken as a word describing the character of the estate which is created in A., and not as descriptive of a class of persons who are to take as purchasers after him. It will not create a life estate in A., with remainder in his descendants after his death, but the issue, if they ever acquire any interest in the property, will take solely by descent from their ancestor, and not as purchasers under the will.⁴

¹ *Ante*, § 644 et seq.

² *Ante*, § 616.

³ See, as to estates tail, *ante*, § 644 et seq.

⁴ *Den v. Emans*, 2-3 N. J. L. 967, 971; *Gibson v. McNeely*, 11 Ohio St. (1860), 181, 139-141; *Paxson v. Leferts*, 3 Rawle (Pa., 1831), 59, 75; *Kay v. Scates*, 37 Pa. St. (1860), 31, 39;

Angle v. Brosius, 43 Pa. St. 187, 189, 190; *Powell v. Mission Board*, 49 Pa. St. 46, 58, 55; *Findlay v. Riddle*, 3 Binn. (Pa., 1810), 139, 160; *Arnold v. Brown*, 7 R. L. 188, 195; *Daniel v. Whartenby*, 17 Wall. (U. S.) 639, 645. A devise to a daughter "for and during the term of her natural life, and at her death to the issue of her

Nor is it material to vary this construction whether A. shall or shall not have issue living at the death of the testator, for the rule in Wild's case¹ is not applicable to a devise to A. and his issue; and in either event he will take the fee in tail. The same construction which applies to a devise to A. and his issue will also apply to a devise to several persons and their issue,² or to a class, and to the issue of the members of the class,³ where the testator has not used express words by which an intention is clearly shown that the issue are to take as purchasers under the will. Thus, in England it has been held that a devise to A. and his issue *living at his death* would give A. an estate tail, though A. had issue living at the death of the testator who might have taken, as joint tenants with him, as purchasers;⁴ though it is very likely that in the United States a similar provision for A. and his issue would give him a life estate with a contingent remainder to his issue.⁵

body who may then be living," vests in her, not a fee conditional, to become absolute on the birth of issue, but an estate for life, remainder to the issue of her body living at the time of her death. *Gadsden v. Desportes*, 17 S. E. R. 706, 39 S. C. 131.

¹ See *ante*, § 579.

² *Beaver v. Nowell*, 25 Beav. 551; *Parkin v. Knight*, 15 Sim. 83.

³ *Campbell v. Bouskell*, 27 Beav. 325. On the creation of estates tail by informal language, see *ante*, § 646.

⁴ *University of Oxford v. Clifton*, 1 Eden, 478; *Lethieller v. Tracy*, 3 Atk. 774, 784, 796.

⁵ "The word 'issue' is well adapted for a word of limitation, having much more aptitude for such a use than it has to designate the objects of a gift. In signification it very nearly resembles the technical phrase 'heirs of the body;' and, indeed, the two were used as synonymous in the statute *de donis*. Hence it has long been settled that when real estate is devised by one or more limitations in the same will to a person and his issue, the word 'issue' will be construed as a word of limitation,

so as to give the ancestor an estate tail, unless there are expressions in the will unequivocally indicative of a contrary intention. It may be that less is required to overcome the primary meaning of the word 'issue' when used in a will than would be necessary to destroy the force of the technical words 'heirs of the body;' but it cannot be regarded as a word of purchase unless the context clearly shows that the testator intended to use it in the abnormal and restricted sense of children, sons, daughters, etc. . . . What, then, is the effect of the added words 'or heirs' in the devise of the remainder? Certainly not to weaken the force of the words 'legal issue,' and to show that the testatrix intended by them, not limitation, but personal description. Whatever may be their meaning, it is manifest that the added words are not restrictive. They are strictly words of limitation. They point to no persons. They express only the character in which the remainder-men are to take, and they are the only words which the testatrix has used explanatory of the de-

§ 671. **The effect of added words of inheritance in modifying a gift of a remainder to issue.**—Frequently the word “issue” is a word of limitation and is synonymous with “heirs of the body,” creating an estate in the ancestor in fee tail. Though this is its ordinary meaning which will attract the operation of the rule in Shelley’s case,¹ yet the word occurring in a devise of a remainder may be taken as a term of purchase and not of limitation, if such is the intention of the testator.² The fact that after a devise to A. for life, and on his death to his issue, the fee is devised *to the heirs male of the issue*, does not prevent A. from taking an estate tail.³

Whether a limitation to the “*heirs general*,” or to the “*heirs and assigns*” of the issue, will convert “issue” into a term of purchase, has been much debated. A limitation to heirs general will not have that effect after a limitation of a remainder to the heirs of the body,⁴ and the words will be rejected as repugnant. In an early case where the language of the will was to A. for life, “then to his issue male and *his heirs forever*,” with a devise over in default of issue, the court held that A. took an estate for life, with a contingent remainder to his issue.⁵ And this rule has been followed in many American cases, with the effect of preventing the application of the rule in Shelley’s case, and of giving the fee in remainder to the issue as purchasers.⁶

But there are one or two English cases in which the devise to the heirs general of the issue has been rejected as repugnant and void, and the court, taking it for granted that the word “issue” is a word of limitation, has applied the rule in Shelley’s case, thus creating in the ancestor an estate tail. Thus,

“*devise to the legal issue.*” Remarks of Strong, J., in *Angle v. Brosius*, 43 Pa. St. 187, 189.

¹ *Ante*, § 561.

² *Powell v. Board of Missions*, 49 Pa. St. (1865), 46, 53.

³ *Roe d. Dodson v. Grew*, 2 Wils. 822, Wilmot, 272; *Hodgson v. Merest*, 9 Price, 556, where the remainder was given “to the issue, and the heirs of the body of issue.”

⁴ See as to the effect of words of limitation on heirs of the body, § 652.

⁵ *Loddington v. Kinne*, 1 Salkeld, 224, *Ld. Raym.* 203.

⁶ *Tongue v. Nutwell*, 13 Md. 415 (1858); *Chelton v. Henderson*, 9 Gill (Md., 1850), 432; *Simpers v. Simpers*, 15 Md. 160, 190, 191; *Shreve v. Shreve*, 43 Md. 382; *Robbins v. Quinliven*, 79 Pa. St. 333; *Findlay v. Riddle*, 3 Binn. (Pa., 1809), 139, 160; *Way v. Gest*, 14 S. & R. (Pa., 1725), 40; *Daniel v. Whartenby*, 17 Wall. (U. S.) 639, 645.

See also *ante*, §§ 659, 660.

in a case where the testator gave land to A. for life, and after the determination of that interest to the *issue male of A.'s body* lawfully to be begotten, and to *their* heirs, and for want of issue then over, the court held that A. took an estate in fee tail under the rule in Shelley's case. In coming to this conclusion the court relied upon the word "*their*" as pointing out that the testator did not mean that the heirs of any particular person were to take, as would have been the case had the remainder been to issue and to *his* heirs. In the latter case, in giving a remainder to the issue of the testator and to his (the issue's) heirs, the testator may have meant to indicate the eldest son or daughter, or some other particular person who, being then in his mind, was to take as a purchaser, being *persona designata*.¹

§ 672. The addition of words of distribution to a devise to issue — Issue may take as tenants in common.— In all cases where the word "issue" has been held to be a word of limitation and not a word of purchase, it has been reasonable to assume, and the court has assumed from the language of the will, that the testator intended the issue of the person mentioned to take by descent, *according to the canons of descent which are recognized by the common law*. At the common law the eldest of the issue male most nearly related to the ancestor would take the fee upon the death of the latter. Hence, where the testator points out a mode of distribution among the issue which is absolutely contrary to and inconsistent with the rules of descent regulating estates in fee tail at the common law, he must be presumed to intend that the issue shall *not take by descent*, or the words of distribution will have to be rejected. The testator may use the word "issue" either as a word of limitation or as a word of purchase; but he cannot, while using it as a word of limitation, so that the issue will take by descent, create new rules of descent contrary to those of the common law.

The addition of words calling for a distribution among issue in the case of a devise to them is of equivocal meaning.² And it must be noticed, as affecting the principles of construction just explained, that "issue," unlike "heirs of the body," is not even *prima facie* a technical word of limitation. It is an ordi-

¹ King v. Burchell, 1 Eden, 424, Amb. 379. ² Ante, § 651.

nary word, and hence it is liable to be diverted from its sense as a word of limitation by a context which would have no effect at all in that respect upon the words "heirs of the body." The English cases in which the word "issue" has been construed are inharmonious upon this particular point. In some of the English cases where the devise was expressly to A. for life, with remainder to his issue after his death, and to *their heirs as tenants in common*,¹ or where a remainder was to go to issue of A., to be *equally divided among them, or share and share alike as tenants in common*,² the word "issue" was, by the effect of this context, construed to be a word of purchase, and in consequence the court refused to apply the rule in Shelley's case.³

This construction is of course materially strengthened where the words directing a distribution among the issue are coupled with words of limitation sufficient to carry the fee to them, as to the "heirs and assigns" of the issue, and also by the fact that there is no gift over on a failure of issue.⁴ The conferring of a power of appointment to be exercised by the tenant for life in favor of the issue of himself is a very material indication that the testator intended the issue to take as purchasers under *his* will in case the life tenant does not exercise the power of appointment. Thus, according to the English cases, it may be stated as a general rule of construction as regards devises in remainder to issue that a devise to one for life, with a remainder to his issue and their heirs in such shares and proportions as the life tenant shall by deed or will appoint, and if the life tenant should not marry and have issue, or if he should not have issue who shall attain full age, then over, gives the issue the fee simple in remainder as tenants in common. The rule in Shelley's case does not apply. The parent does not take an estate tail.⁵

The power in the parent to appoint among the issue raises

¹ Slater v. Dangerfield, 16 Mee. & Wel. 263, 273.

² Huller v. Ironmonger, 2 East, 383; Greenwood v. Rothwell, 5 M. & G. 628, 6 Beav. 492.

³ See *ante*, § 651, as to the effect of words directing an equality of division among heirs of the body.

⁴ See remarks of Langdale, J., in Greenwood v. Rothwell, 6 Beav. 492.

⁵ Lees v. Mosley, 1 Y. & C. 589. To the same effect is Hockley v. Mawbey, 1 Ves. Jr. 143, 150; Crozier v. Crozier, 3 Drewry & War. 373, where the devise was in remainder to issue, to be divided among them as the life tenant should appoint.

by implication an interest in them as beneficiaries in default of the execution of the power. For this power is both special and imperative, and a neglect to exercise it, or an exercise of it outside of the limits of the class which has been pointed out by the testator, will be corrected by a court of equity. If the appointor shall exercise the power, his issue then take under the original instrument creating the power; while, if he shall fail to exercise the power, the issue still take under the original will in default of a valid appointment to them by their ancestor.¹

¹ In the case of *Lees v. Mosley*, 1 Y. & C. 589, the court, after distinguishing between the words "heirs of the body," which are *prima facie* technical words of limitation, and "issue," which is a non-technical word, stated that the word "issue" was used in the statute *de donis* as synonymous with children and descendants of every degree, and further said as follows: "The testator begins by devising an express estate for life to his son. He then devises a remainder to his (the son's) lawful issue. If he stopped there, it would be an estate tail in the son. For the word 'issue' might include all descendants, and, all being unborn, no assignable reason could exist for distinguishing between any of them. And then the rule in *Shelley's* case would apply, and would convert the estate for life previously given into an estate tail. But the testator then adds, '*and their respective heirs in such shares as he, the said son, shall by will or deed appoint.*' Now, according to *Hockley v. Mawbey*, 1 Ves. Jr. 143, 150, the effect of this clause would be to give the objects of the power an interest in an equal distributive share, in case the power was not executed. The clause, therefore, is equivalent to a declaration by the testator that the issue and their respective heirs shall take equal shares, but that the son should have

a power of distributing amongst them the estate in unequal shares if he thought fit. Now, if 'issue' be taken as a word of limitation, the word 'heirs' would be first restrained to heirs of the body, and then altogether rejected as unnecessary. The word 'respective' would have no particular meaning annexed to it; and the apparent intention of the testator to give his son, and afterwards to distribute his property in shares among his issue, would be frustrated. On the other hand, if 'issue' be taken as a word of purchase, designating either the immediate issue or those living at the death of the son, the apparent intention will be effectuated, and all these words will be given their peculiar and ordinary acceptation. If then the will stopped here it would seem clear that the court ought to read 'issue' as a word of purchase. Then comes the devise over. . . . Now the effect of such a clause, if superadded to a remainder to children, would be to show an intention to give a fee to the children on their attaining the age of twenty-one. And if by the former part of the will the same estate has been given, it does not appear to be sound reasoning to draw the conclusion that such a clause can convert an estate previously given into an estate tail."

And the fact that in such cases, where a power of appointment exists, there is added a limitation over upon an *indefinite failure of the issue* of the first devisee, will not convert the devise into a fee tail in him, where an estate for life is given him in express terms, though such a limitation over is always a circumstance to be considered. On the other hand, in very many cases the English courts have refused to apply a construction that rejects the rule in Shelley's case where words of distribution are annexed to a gift of a remainder to issue. Accordingly, where the gift was to A. for his natural life, remainder "*to and amongst*" his issue;¹ or remainder to his issue "*share and share alike*;"² or where the testamentary disposition was to several individuals and to *their issue male and female* forever, to be equally divided;³ or where the gift was in remainder to issue as *tenants in common, without words of distribution*;⁴ or where the devise was to *the issue of several in remainder*, and for want of *such issue then over*;⁵ or where the devise was in remainder to issue, and if *more than one equally among them*, but if no issue of the life tenant *living at his death*, then over to another,⁶ the court held that the ancestor took an estate tail by the operation of the rule in Shelley's case. And though in most of these cases the circumstance that there was a devise over upon an indefinite failure of issue was regarded as strengthening the presumption that an estate tail was meant to be given, in some this circumstance was wholly disregarded.⁷

The rule that, independently of statute, a devise in indeterminate language confers only a life estate on the devisee must also be considered in connection with a devise of a remainder to issue. If the remainder was given to issue, *without words of limitation carrying the fee to them*, the inference was stronger that the ancestor was to take an estate tail, and the issue must take from him, as that would be the only way they could ever take the fee. But where the remainder in fee was

¹ Doe d. Blandford v. Applin, 4 T. R. 82. 823, 881, 882; Harrison v. Harrison, 7 Man. & Gr. 938.

² Heather v. Winder, 5 L. J. (N. S.) Ch. 41. ⁵ Woodhouse v. Herrick, 1 K. & J. 352.

³ Tate v. Clarke, 1 Beav. 100.

⁶ Cannon v. Rucastle, 8 Com. Bench, 876.

⁴ Doe d. Cook v. Cooper, 1 East, 229, 235; Croly v. Croly, Batty, 1; Roddy v. Fitzgerald, L. R. 6 H. L. Cases, ⁷ Crozier v. Crozier, 3 D. & War. 373; Green v. Rothwell, 5 Man. & Gr. 628.

given to the issue, whether by technical words, as "heirs and assigns,"¹ or by a devise of the "*estate*,"² the express gift of the fee raised an inference that the testator meant them to take as purchasers as against the parent, to whom a life estate in precise language had been given.³

§ 673. A devise to "A. for life, and then to his issue," converted into a fee by the rule in Shelley's case.—The origin and character of the rule in Shelley's case will be found fully discussed in another place in this work.⁴ It is necessary here to consider the rule only so far as it may be applicable to a devise to a person for life, and *after his death to his issue, simpliciter*, and without words of distribution or inheritance.

The application of the rule, according to the authorities, is not prevented by the fact that the "heirs of the body" are described by other than technical and appropriate words.⁵ Its application does not depend either upon the intention of the testator, or upon the fact that he has or has not used technical language. Hence, if from the will it appears that he has created a life estate, with remainder in fee to the issue, and that by issue he meant "heirs of the body," the rule in Shelley's case will apply. Such a case should clearly be distinguished from a devise to "*A. and his issue*," for in the latter case no life estate is created in express terms, and no necessity exists for applying the rule in Shelley's case, as A. takes an estate tail. The language of the testator can have but one meaning here, and the issue take by descent, for the word is synonymous with "heirs of the body of A." But a devise to *A. for his life expressly, with a remainder to his issue in fee*, clearly expresses an intention that the issue are not to take by limitation, but as purchasers, and they would take as purchasers, but that the rule in Shelley's case necessitates that they shall take by descent.⁶

¹ *Lees v. Mosley*, 1 Y. & C. 589; *Greenwood v. Rothwell*, 5 Man. & Gr. 628.

² *Crozier v. Crozier*, 3 D. & W. 373; *Bradley v. Cartwright*, L. R. 2 C. P. 511.

³ For other cases illustrating the text, see *post*, § 674.

⁴ *Ante*, § 655 et seq.

⁵ *Ante*, § 661.

⁶ *Carroll v. Burns*, 108 Pa. St. (1885), 386; *Wilson v. Denig*, 166 Pa. St. 29, 30 Atl. R. 1025; *Kay v. Scates*, 37 Pa. St. 31, 39; *James' Estate*, 1 Dall. (Pa.) 47; *Angle v. Brosius*, 43 Pa. St. (1862), 187, 189 (where the devise was to "legal issue or heirs"); *Paxson v. Lefferts*, 3 Rawle (Pa., 1831), 59, 75

§ 674. Definition and construction of the word "issue," when it is a word of purchase.—The word "issue" may be presumed to be used as a word of purchase in the absence of any indication of a contrary intention. The testator may indicate that he has employed it as synonymous with "heirs of the body," when it will be a word of limitation, and will create an estate in tail.¹ The distinction is as follows: If the testator gives land to A. for his life, and after his death to his issue, meaning thereby his descendants, he will be presumed to have meant that those persons who answer the description of descendants shall take as purchasers, and they take, independently of statute, as joint tenants. If, on the other hand, he has used the word "issue" as meaning heirs of the body, it will be presumed that he intended the issue to take by descent, and the words will create an estate tail,² which the statute in America will turn into an estate in fee simple.

The primary sense of the word "issue," when used as a word of purchase and not controlled by the context, has been held from the earliest times to be descendants of every degree of relationship. It is not to be restricted to children. It will include descendants, *i. e.*, offspring of every description and every degree of relationship to the *propositus*.³ So a power to appoint

(to "A. for life, and, if he shall leave lawful issue, to them, their heirs and assigns"); *Den v. Emans*, 2 N. J. L. 967; *Gibson v. McNeely*, 11 Ohio St. 131; *Powell v. Board of Domestic Missions*, 49 Pa. St. 46, 55; *King v. Melling*, 1 Vent. 225, 232, 3 Levinz, 58, 61; *Taylor v. Sayer*, Cro. Eliz. 742; *Shaw v. Weigh*, 2 Strange, 798. 1 Eq. Ab. Cas. 184, pl. 28; *Haddesley v. Adams*, 22 Beav. 266. But the case of *Henderson v. Henderson*, 64 Md. 185, holds that the rule is not applicable to a devise to A. and his issue. *Gadsden v. Desportes*, 39 S. C. 131, 17 S. E. R. 706. See also *ante*, § 661.

¹ See *ante*, § 672.

² *Ante*, § 673.

³ *Edwards v. Bibb*, 43 Ala. (1869), 666. 672; *Jackson v. Jackson*, 153 Mass. 374, 376, 26 N. E. R. 112; *Houghton v. Kendall*, 7 Allen, 72, 76; *Hills*

v. Barnard, 152 Mass. (1890), 67, 73; *Bigelow v. Morong*, 103 Mass. (1869), 287, 288; *Price v. Sisson*, 15 N. J. Eq. 168, 177; *Weehawken Ferry v. Sisson*, 17 N. J. Eq. 475, 484, 486; *United States Tr. Co. v. Tobias*, 21 Abb. N. C. 392; *Tier v. Pennell*, 1 Edw. Ch. (N. Y., 1832), 354; *Palmer v. Horn*, 84 N. Y. 516, 519; *Drake v. Drake*, 134 N. Y. 220, 224; *Soper v. Brown*, 136 N. Y. (1892), 244, 248, 33 N. E. R. 768; *Chwatal v. Schreiner*, 43 N. E. R. 166, 148 N. Y. 683, 687; *Gest v. Way*, 2 Whart. (Pa.) 45; *In re Birely's Estate*, 7 Pa. Dist. R. 95; *Neo v. Ramsay*, 26 Atl. R. 770, 155 Pa. St. 628; *Grimes v. Shirk*, 32 Atl. R. 113, 169 Pa. St. 74; *Shalters v. Ladd*, 21 Atl. R. 596, 28 W. N. C. 33, 141 Pa. St. 349; *Robbins v. Quinliven*, 79 Pa. St. 333, 335; *Appeal of Bowie*, 24 Atl. R. 297, 149 Pa. St. 418; *Taylor v. Taylor*, 63 Pa. St. 484;

among the issue of a person is validly executed by an appointment which takes in the grandchildren, as well as the children of that person; and if the power is discretionary, it may be exercised in favor of any issue, irrespective of the fact that the parents of the persons selected are excluded.¹

And where a fee-simple was limited over, upon default of an appointment by will, to the issue of A., who had died, leaving several children living, some of whom had children, the court decreed a division among children and grandchildren alike *per capita*, and not *per stirpes*.² Where issue are to take as purchasers and by substitution the shares of their respective ancestors who die before the date of vesting, with a limitation over to the survivors of the shares of those who die without issue, living at their death, the issue who survive take *per capita*, where the direction is to divide among them equally. But this primary sense of the word "issue" is never conclusive, and the meaning of the term may be restricted to a particular class of offspring, if this appears to have been the intention of the testator.³

Gammell v. Ernst, 19 R. L. 293, 295, 33 Atl. R. 222; Pearce v. Rickard, 18 R. L. 142, 26 Atl. R. 38; Beckam v. De Sausure, 9 Rich. L. (S. C.) 531; Corbett v. Laurens, 5 Rich. (S. C.) L. 301; Ingraham v. Meade, 3 Wall. C. C. (U. S., 1854), Jr. 42; Adams v. Law, 17 How. (58 U. S., 1854), 421; Weldon v. Hoyaland, 4 De Gex, F. & J. 564; Penny v. Clarke, 1 De Gex, F. & J. 425, 431; Roddy v. Fitzgerald, 6 H. L. C. 823, 881, 882; Kavanagh's Will, L. R. 13 Ir. Ch. 120; South v. Searle, 2 Jur. (N. S.) 390; Hobgen v. Neale, L. R. 11 Eq. 48, 51; In re Corlass, L. R. 1 Ch. D. 460, 45 L. J. Ch. 119; In re Jones' Trusts, 23 Beav. 242; Maddock v. Legg, 25 Beav. 531; Hall v. Nalder, 22 L. J. Ch. 242, 17 Jur. 224; Treeman v. Parsley, 3 Ves. 421, 423; Bernard v. Montague, 1 Mer. 434; Hockley v. Mawbey, 1 Ves. Jr. 143, 150; Horsepool v. Watson, 3 Ves. 383, 384; Wythe v. Thurlston, Amb. 555; Davenport v. Hanbury, 3 Ves. 258; Mitchison v.

Buckton, 23 Week. R. 480. See also case cited under § 672. The rule in the text is applied to both real and personal property.

¹ Drake v. Drake, 134 N. Y. 220, 56 Hun, 590; *post*, §§ 800, 803.

² See cases cited in note 3, p. 918.

³ The word "offspring" is precisely synonymous with "issue," and may be a word of limitation, creating an estate tail or of purchase, in which case the rules and principles laid down in the preceding sections as applicable to "issue" may with safety be resorted to. Barber v. Railroad Co., 166 U. S. 83, 101, 165 Pa. St. 649, 650; Allen v. Markle, 36 Pa. St. 117; Thompson v. Beasley, 3 Drewry, 7; Young v. Davies, 2 Drew. & Smale, 167, where the word was a word of limitation. Sometimes the meaning of the term may be restricted by the context to children. Lister v. Tidd, 29 Beavan, 618.

§ 675. The restriction of the word “issue” to children as purchasers.—The tendency of the English cases down to recent times has been strongly in favor of the broad construction of the word “issue” when it is employed as a word of purchase, by which it includes all descendants. Doubtless this construction of the word has often overthrown the true intention by diverting the testator’s gift beyond his children. In a late English case it has been remarked that the popular sense of the word “issue” is children;¹ and we find Chancellor Kent, in his Commentaries, stating that, while “issue” may be a word of limitation or a word of purchase, yet it is generally used by the testator as synonymous with “children.”² More recently still, Mr. Redfield, in his valuable Treatise on Wills,³ has inserted several strong observations on the injustice of construing the word “issue” as synonymous with descendants of every degree. These suggestions and observations on the rule have had the effect of causing the courts in recent times, particularly in America, to restrict the meaning of the term so that it shall take in children only. They will seek for indications of an intention on the part of the testator in this direction, and this intention, though ascertained from slight hints and suggestions, will prevail.

The question is not as to the popular meaning of the word, but what the testator meant by using it.⁴ Its technical meaning must prevail where the testator does not show that he intended that it should have another meaning. If it appears from the context that the testator intended to restrict the meaning of the word “issue” to children only, it should be so construed. But in the absence of indications of that intention, its technical and primary meaning must prevail.

We will consider cases in which the testator has used the word “issue” in its restricted meaning. Thus, where it is provided, in connection with a devise either to persons or to a class, that the issue of any dying before the time of distribution shall take their *parent’s* share, the word “issue” will be held to mean “children.” The use of the word *parent* very clearly indicates that the idea of the relation of *parent and*

¹ *Ralph v. Carrick*, L. R. 11 Ch. D. 882, 885.

² 4 Kent, Com. 278.

³ Part 2, p. 363.

⁴ For cases in which “heirs” has been construed “children,” see § 616.

child, and not that of ancestor and descendant, was in the mind of the testator.¹

A direction that a gift of land as a remainder is to go to issue of the life tenant, with an added direction, "if only *one child* (*i. e.*, of the life tenant), then to such only child," does not of necessity interpret the word "issue" as synonymous with "children;" for here, though the testator may mean that, if the issue consist of only one child, that child shall take, he does not mean to exclude other issue if there be more than the one child.² An only child, consistent with the language of the will, may take by descent, and all the issue of the first taker may take through him. But when the property disposed of is personalty, which is distributed and does not descend, the use of the word "issue" as equivalent to "heirs of the body" is improper, so that if one gives personal property to "issue," and if "one child, then to *that* child," the inference is conclusive that children, and not more remote issue, were meant by the word, and *also* that "issue" is a word of purchase, not of limitation.³ So, also, where the devise was for the issue of *A. lawfully begotten by him of his body*;⁴ or where there is a devise to *children in remainder* after the death of the parent who is the life tenant, and "*in default of issue*," then over;⁵ or where the gift in the first instance is to *issue for life, and*

¹Sibley v. Perry, 7 Ves. 522; Ross v. Ross, 20 Beav. 645; Bryden v. Willett, L. R. 7 Eq. 472, 475; Lanphier v. Buck, 2 Drew. & Smale, 484, 493; Parkhurst v. Harrower, 142 Pa. St. 432, 21 Atl. R. 826; Palmer v. Horn, 84 N. Y. 516; McPherson v. Snowden, 19 Md. 197, 203; King v. Savage, 121 Mass. 303, 306; McGregor v. McGregor, 1 De Gex, Fisher & Jo. 63. For cases in which the words "heirs of the body" have been construed as "children" and as words of purchase, see *ante*, § 659.

²Roddy v. Fitzgerald, L. R. 6 H. L. Cases, 823.

³Burleson v. Bowman, 1 Rich. Eq. 111; Carter v. Bentall, 2 Beav. 551; Hopkins' Trusts, L. R. 9 Ch. Div. 131.

⁴Daniel v. Whartenby, 17 Wall. (84 U. S.) 639; but see, *contra*, on this

point, Caulfield v. MacGuire, 2 Jo. & Lat. 162, 176; Evans v. Jones, 2 Collyer, 516, 524-526; Haydon v. Wilshire, 3 T. R. 372, which holds that the phrase "lawfully begotten" is not sufficient to limit the meaning of the term to children.

⁵In a devise to A. for life, remainder to his children, and a devise over on the death of A. *without issue*, the meaning of the word "issue" will be confined to *such* issue as would take under the former limitation. In re Wyndham's Trusts, L. R. 1 Eq. 290; Pride v. Fooks, 3 De Gex & Jo. 252, 280; Hedges v. Harpur, 3 De Gex & Jo. 129; In re Crawford's Trust, 2 Drewry, 234; Chapman v. Chapman, 33 Beav. 556; Dixon v. Dixon, 24 Beav. 129.

*upon their death to their issue,*¹ the word "issue" will be construed in a restricted sense as meaning children. So often, in a devise to a person for life, with a remainder to his issue, the word "issue" will be regarded as signifying his children alone, particularly if the property is devised *over on a definite failure of issue.*² So in a case where land was given to A. for life, and on his death to his lawful *issue male*, and the lawful issue of such heirs, the eldest of *such sons to be preferred before the others,*³ the court held that A. did not take a fee tail, but a life estate, with a remainder to his sons in order of priority of birth. A provision that, on the death of the life tenant, a fund is to be divided among her *then living issue*, "provided *such child or children shall attain the age of twenty-one,*" and for want of such issue then over, indicates very conclusively that the testator, by the word "issue," meant children alone.⁴

The fact that in one portion of his will the testator uses the word "issue" *as clearly and plainly synonymous with children* may indicate that he wishes it to have *that* meaning when used in another part of his will. But the fact that the testator in one clause employs the word "issue" in its restricted sense is not always conclusive that he wishes it to have that sense wher-

¹ Pope v. Pope, 14 Beav. 593; Fairfield v. Bushell, 32 Beav. 158; Williams v. Teale, 6 Hare, 239.

² Hill v. Hill, 74 Pa. St. (1873), 173; Way v. Gest, 14 Serg. & R. (Pa., 1825), 40; Burleson v. Bowman, 1 Rich. Eq. (S. C., 1845), 111; Arnold v. Alden, 50 N. E. R. 704, 173 Ill. 229; Horn v. Lyeth, 4 Har. & J. (Md.) 437; Thomas v. Levering, 73 Md. 451, 458, 21 Atl. R. 367; McPherson v. Snowden, 19 Md. (1862), 197; King v. Savage, 121 Mass. 303, 306; Lee v. Gay, 155 Mass. (1892), 423, 29 N. E. R. 632; Howland v. Slade, 155 Mass. 415, 29 N. E. R. 631; Bigelow v. Morong, 103 Mass. (1869), 287, 289; Neo v. Ramsey, 155 Pa. St. 628, 26 Atl. R. 770; In re Wells, 3 Dem. (N. Y.) 86; Palmer v. Dunham, 125 N. Y. 68, 25 N. E. R. 1081; Shalter v. Ladd, 8 Pa. Co. Ct. R. 528; Wistar v. Scott, 105 Pa. St. 200, 213; Bruen v. Osborne, 11 Sim. 132; Bird-

sall v. York, 5 Jur. (N. S.) 1237; Martin v. Holgate, L. R. 1 H. L. C. 175; Heasman v. Pearse, L. R. 7 Ch. 275; Bryden v. Willett, L. R. 7 Eq. 472, 475; Wyndham's Trusts, L. R. 1 Eq. 290; Sander's Trusts, L. R. 1 Eq. 675; Crozier v. Crozier, 3 Drew. & War. 386; Lanphier v. Buck, 2 Drewry & Smale, 484, 493; Ridgway v. Munkittrick, 1 Drew. & War. 84; McGregor v. McGregor, 1 De Gex, F. & Jo. 63; Bradley v. Cartwright, L. R. 2 C. P. 511; Buckle v. Fawcett, 4 Hare, 536, 544; Livesay v. Walpole, 23 Week. R. 825; Bradshaw v. Melling, 19 Beav. 417; Machell v. Weeding, 8 Sim. 4; Rhodes v. Rhodes, 27 Beav. 305; Marshall v. Baker, 31 Beav. 608; Fairfield v. Bushell, 32 Beav. 158.

³ Mandeville v. Lackey, 3 Ridg. P. C. 352.

⁴ Ryan v. Crowley, 1 Ll. & G. 7.

ever it is used.¹ Thus, where the testator conferred a power of appointing a fund among A., B. and C. and their issue upon D., and in case of the death of either A., B. or C., during D.'s life, the issue was to take the parent's share, though by the latter words *issue* was restricted to *children*, the power of the donee was not restricted to an appointment among children.² On the other hand, where property was placed in trust for A., and after his death, should he have *issue*, then to maintain and educate *the issue* "*share and share alike*," and on their majority to transfer to them, and if only *one* then to that one, and the testator followed this up with a provision for the *children* of A., to be employed in such manner "*as he had already directed as to his funded property*," the court held that the word "issue" as used was by the context precisely synonymous with children.³ The ascertainment of the meaning of the word "issue" is important, where there is a devise of a life estate to A., with a *remainder to his issue*, and, *in default of issue*, remainder to his heirs. Assuming that the failure of issue pointed out is a definite failure of issue, the question arises whether *issue*, in the limitation of a remainder to the issue of A., means his children to the exclusion of other descendants, and whether his death without leaving children, but leaving other issue, as grandchildren, surviving, will defeat the remainder over. The general rule in such cases is that the gift over will be defeated if there are *any issue, whether children, grandchildren* or more remote; and that this being the meaning of the term "issue" in the latter part of this disposition, it should also be its meaning in the former part. Hence, even where the immediate gift of a remainder to the issue is coupled with a provision that issue shall take their parent's share, the word "issue" will not always be construed children of the life tenant, but will be construed descendants, because of the meaning attached to it in the latter part of the clause.⁴

¹ *Caulfield v. Maguire*, 2 Jo. & Lat. 176; *Head v. Randall*, 2 Y. & C. C. C. 231; *Carter v. Bentall*, 2 Beav. 551; *Cursham v. Newland*, 2 Bing. N. C. 58, 2 Scott, 105, 2 Beav. 145, 4 Mees. & W. 101; *Hedges v. Harpur*, 9 Beav. 479.

² *Drake v. Drake*, 32 N. E. R. 114, 134 N. Y. 220.

³ *Ellis v. Selby*, 7 Sim. 352.

⁴ *Ralph v. Carrick*, L. R. 5 Ch. D. 984; *Soper v. Brown*, 136 N. Y. 244, 32 N. E. R. 768. In *Palmer v. Horn*, 84 N. Y. 516, on page 519, the court by Earl, J., says: "The word 'issue' is an ambiguous term. It may mean descendants, generally, or merely children; and whether in a will it

§ 676. Mode of distribution among issue as purchasers.—

The mode of distribution among issue, when they take as purchasers, depends wholly upon the intention of the testator as it is expressed in, or implied from, the language of the will. A gift of personal estate to issue simply, where the testator has evidently used the word to include *all* descendants, will be divided *per capita* among them as a class, though the issue may stand related in different degrees to their ancestor.¹ Often, however, a distribution *per stirpes* has been decreed among issue who were in different degrees of relationship to a common ancestor, particularly if some reference is made to a taking by representation or substitution.²

A direction that a fund is to be divided *between* the issue of A. *and* the issue of B. *equally* will indicate a distribution of an equal share *per stirpes* among the issue of A. and B. respectively, and the children, grandchildren and remoter issue of the persons named will take by representation.³ And while a devise to the issue of a person, in case he shall be deceased before distribution, *simpliciter*, may not be enough alone to indicate a division *per stirpes* among that issue, and all the descendants of the deceased person may take *per capita*,⁴ yet it has been held in an American case that a direction that in case of the death of the legatee his issue shall stand in the parent's place⁵

shall be held to mean the one or the other depends upon the intention of the testator as derived from the context or the entire will, or such extrinsic circumstances as may be considered. In England, at an early date, it was held, in its primary sense, when not restrained by the context, to be co-extensive and synonymous with descendants, comprehending objects of every degree. But it came to be apparent to judges there that such a sense given to the term would, in most cases, defeat the intention of the testator, and hence in the later cases there is a strong tendency, unless restrained by the context, to hold that it has the meaning of children."

¹ Corbett v. Laurens, 5 Rich. Eq. (S. C., 1853), 301; Purcell v. Purcell,

Riley L. (S. C.) 282, 284; Hogben v. Neale, L. R. 11 Eq. 48 (1870); Davenport v. Hanbury, 3 Ves. 257; Jones' Trusts, 28 Beav. 242, 243; Mitchison v. Buckton, 28 W. R. 480 (1875); Leigh v. Norbury, 13 Ves. 340; Weldon v. Hoyland, 4 De Gex, F. & Jo. 564; Freeman v. Parsley, 3 Ves. 421, 423; Ridley v. McPherson (Tenn., 1897), 43 S. W. R. 772; Pearce v. Rickard, 18 R. L. (1893), 142, 26 Atl. R. 38. And see further cases cited under § 674.

² Dexter v. Inches, 147 Mass. 324 (1888), 17 N. E. R. 551.

³ Brett v. Horton, 4 Beav. 239.

⁴ Weldon v. Hoyland, 4 De Gex, F. & Jo. 564; Birdsall v. York, 5 Jur. (N. S.) 1287.

⁵ Lockwood's Appeal, 55 Conn. 157, 10 Atl. R. 517.

would require a distribution among the issue *per stirpes* through every degree of remoteness of descent.¹ Where the direction was to divide a residue equally *between* my two sisters and the lawful issue of my two deceased sisters in equal shares if more than one of such respective issue,² a distribution *per stirpes* was ordered.³

§ 677. **Meaning of the word "descendant."**—This word is in no wise ambiguous. Its primary meaning is precisely synonymous with issue, heirs of the body, *i. e.*, posterity of every degree of relationship.⁴ No necessity exists that the word should be construed as equivalent in meaning to next of kin or relations, nor that any collateral relations should be included under the term. Hence, the word "descendants" of A. does not include brothers and sisters of A.⁵ The word, unlike relations and next of kin, has a fixed and definite meaning.⁶ No reference to any statutes, whose phraseology differs in different states, is necessary to ascertain its ordinary signification, for its technical and its ordinary meaning are the same, *i. e.*, individuals who are branches of the same common stock. Thus, the descendants of A. not only include his children but his grandchildren, great-grandchildren, etc.⁷ The context may

¹In *Cushney v. Henry*, 4 Paige (N. Y.), 345, 354, the devise was to the issue of several persons named A., B. and C., and to their issue, "one share to the issue of each, to take as tenants in common," and a division *per stirpes* was directed.

²*Davis v. Bennett*, 4 De Gex, F. & Jo. 327, 329.

³The cases which are cited under section 678, *post*, as examples of the mode of distributing property devised to descendants are also applicable when the question is as to the proper mode of distributing property given to issue who are to take as purchasers.

⁴2 Redfield on Wills, 74; Williams on Executors, 1202.

⁵*Armstrong v. Moran*, 1 Bradf. 314; *Barstow v. Goodwin*, 2 Bradf. (N. Y.) 413, 416; *Hamlin v. Osgood*, 1 Redf. (N. Y.) 409, 411.

⁶"Descendants, those who have issued from an individual, and include his children, grandchildren, and their children to the remotest degree. The descendants form what is called the direct descending line. The term is opposed to ascendants." *Jewell v. Jewell*, 28 Cal. (1865), 236.

⁷*Atherton v. Crowther*, 19 Beav. 448, 451; *Pierson v. Garrett*, 2 Bro. C. C. 38, 44; *In re Flower*, 62 L. T. 216, 220 (No. 1); *Weldon v. Hyland*, 4 De Gex, F. & J. 564; *Mercantile Bank v. Ballard*, 85 Ky. 481; *Baker v. Baker*, 8 Gray (Mass.), 101; *Mitchell v. Thorne*, 134 N. Y. 536, 32 N. E. R. 12; *Bryan v. Wilson*, 20 Ga. 480 (1856); *Walker v. Walker*, 25 Ga. 428 (1858); *McLure v. Young*, 3 Rich. Eq. (S. C.) 559; *Schmaunz v. Gross*, 132 Mass. 144; *In re Green*, 131 N. Y. 586, 15 N. Y. S. 240.

restrict the meaning of the word "descendants." Thus, where the devise was to "issue, children or descendants" of a life tenant, and he left children and grandchildren, the former took, excluding the grandchildren.¹

In an English case where real property was given "*to the descendants of A. now living in or about S., or hereafter living anywhere else,*" all of A.'s posterity were admitted, grandchildren and great-grandchildren included; but a child born to the great-grandchild in S., after the execution of the will, was excluded by the words "now living."² And in one case which deserves to be noted, the court held that descendants might include collaterals. A gift was to "such person or persons as shall be *nearest in blood to me as descendants from my great grandfather T. H., and whose kindred with me originates from him.*" The only person precisely answering to this description at the date of the will was the testator's sister. Both she and her brother were so far advanced in years that their having children was highly improbable. It was held that the descendants of the brother of T. H. should take. This decision is clearly wrong, for while a man may be a descendant from his father or grandfather, he cannot in any acceptation of the term be the descendant of his uncle or grand-uncle.³

¹ Thomas v. Levering, 73 Md. 451, 21 Atl. R. 367. A power to devise "among children or their descendants" means not only living children and the descendants of deceased children, but the descendants of children who may be alive. Hilten v. Iselin, 67 Hun, 444, 22 N. Y. S. 282. The testator, who was a widower without living issue, devised property to "all his relations who may prove their relationship *to me* by lineal descent." The court held that as the testator had not required the relations to prove lineal descent *from* him, he evidently meant descent with him from a common ancestor, and that, therefore, cousins and other collaterals might be included. Craik v. Lamb, 1 Coll. 489.

² Crossly v. Clare, Amb. 397, 3

Swanst. 320; Legard v. Haworth, 1 East, 120.

³ Best v. Stonehewer, 34 Beav. 66, 2 D. J. & S. 537. Mr. Roper in his work on Legacies, on page 136, says: "Attempts have been made to induce the court of chancery to put the same construction upon the word '*descendants*' as upon the term '*relations*,' but the court has constantly refused the application, since the principle which applies to the latter case does not apply to the former; for when a bequest is made to '*relations*,' unless the court were guided by the statute of distribution in ascertaining the legatees, the disposition would be void from the generality and uncertainty of the term; but when the word '*descendants*' is used, there is no necessity for resorting to the stat-

§ 678. **Mode of distribution among descendants.**— Under a devise to descendants simply, they will take *per capita* unless the testator expressly indicates that he wishes them to take otherwise. Where a provision is for descendants *equally*,¹ all take *per capita* and not *per stirpes*.² On the other hand, if the testator in providing for his own descendants, or for the descendants of another, refers to the statute as providing a mode of distribution, the descendants will take by representation; and the same is true where he gives property to the descendants of certain persons whom he refers to.³ Where the descendants are expressly directed to take *per stirpes*, the rule of taking by representation will be strictly applied to the descendants in all degrees; children in each gradation to the common *propositus* will not take concurrently with the descendants of the nearer grade to him, but by representation. So where the gift was to the descendants of the brothers and sisters of the testator *living at his death*, the fund was divided into as many equal parts as there were brothers and sisters living at the death of the testator, and each of these parts was divided into as many shares as each brother and sister had living children, or children who had died before the testator leaving children or descendants, and each of these shares was again to be subdivided in the same manner, but in no case was a child or descendant to take concurrently with the ancestor.⁴

Doubtless the same mode of division ought to be adopted in case of a devise to issue, they to take as purchasers. The term "eldest male lineal descendant" signifies not only a descendant who is a male, but a descendant who claims through a male descendant as well. The use of the word "*lineal*" in connection with descendant seems at first glance mere repetition and not as adding much to the meaning of the latter word. But

ute to fix or limit the objects of the bequest, as the natural import of the term is sufficient to include every individual proceeding from the stock or family referred to by the testator, so that a legacy 'to the descendants of B.' will comprehend all his children, grandchildren, etc."

¹ Butler v. Stratton, 3 Bro. C. C. 367.

² In re Flower, 62 L. T. 216, 220; MacGregor v. MacGregor, 2 Collyer,

192; Southam v. Blake, 2 W. R. 446; Rhode I. T. Co. v. Harris (R. L., 1898), 39 Atl. R. 750; Crossly v. Clare, 3 Swanst. 320; Butler v. Stratton, 3 Bro. C. C. 367.

³ Rowland v. Gorsuch, 2 Cox Ch. R. 187.

⁴ Gibson v. Fisher, L. R. 5 Eq. 51, 57. Cf. Robinson v. Shepherd, 32 Beav. 665, 10 Jur. (N. S.) 53; Barstow v. Goodwin, 2 Bradf. (N. Y.) 413.

where, as in the case under consideration, the testator repeated it several times in the will, it must have had some meaning, and it could mean nothing at all if it did not mean a descendant of male lineage.¹ Under a devise to "male issue of A.," however, all lineal descendants are entitled, whether sons or grandsons, and whether they are sons of A.'s sons or of his daughters.²

¹Oddie v. Woodford, 3 Myl. & Cr. 584; and compare Bernal v. Bernal, 3 Myl. & Cr. 559, where "male children" meant children claiming through males only.

²Wistar v. Scott, 105 Pa. St. 200.

CHAPTER XXXV.

THE CREATION OF ESTATES IN FEE WITH AND WITHOUT WORDS OF INHERITANCE OR PERPETUITY.

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| <p>§ 679. A devise of land in indefinite language creates a life estate only at common law.</p> <p>680. The effect of an introductory clause purporting to dispose of the whole estate.</p> <p>681. The operation of the word "estate" in conveying the fee.</p> <p>682. An express devise for life is not enlarged into a fee by a gift of the estate.</p> <p>683. Fee simple in the beneficial interest created by a devise in trust.</p> <p>684. Words of inheritance, when not necessary to create a fee at common law.</p> <p>685. A direction to the devisee of land to pay debts and legacies may enlarge his estate to a fee.</p> | <p>§ 686. A power of disposal may raise a fee by implication.</p> <p>687. A life estate with a power of sale for support.</p> <p>688. A life estate with power of appointment by will.</p> <p>689. A devise of the fee simple not cut down by a devise of "what remains."</p> <p>690. The effect of a devise over on death during minority in creating a fee.</p> <p>691. Gifts for life of consumable articles.</p> <p>692. A bequest of the rents and profits of land carries the land.</p> <p>693. Statutory changes in England of the rule which required words of inheritance to pass the fee.</p> <p>694. Statutory regulations in the United States.</p> |
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§ 679. A devise of land in indefinite language creates a life estate only at common law.—At the common law, that is to say, independently of the statutes enacting that a devise of land shall carry all the interest therein which the testator possesses at his death, in the absence of an express contrary intention,¹ it is the rule that under a devise of land couched in general terms, without words of limitation or inheritance, and in the absence of language which either expressly or by clear implication shows that the testator intended to convey the fee, the devisee takes a life estate only. This is the case where the testator, for example, devises a piece of ground particularly described as "lot A" or described by him as his farm

¹ Co. Litt. 42; 2 Black. Com., p. 121.

or house, known as the "B." farm or located at "B.," where the description is limited to the situation of the land which is devised, and it contains nothing to show what estate or interest in the land the testator intended to give.¹

But this common-law rule of construction is not, and never was, applicable to a general devise of "*all the estate* of the testator," nor to a devise of the "*residue of his estate*," nor to a devise which is expressed in indeterminate language, where, from the introductory clause (as will be subsequently explained), or from any other portion of the will, it is clear that the testator intended to give the fee;² for the presumption of an intention to give a life estate which the common law raises in the case of a grant which omits words of inheritance or limitation was never conclusive in a will. If, from the whole will, it appeared that the testator intended to give the fee, or to give all the interest which he had in the lands devised, it would pass, although he had not used words of inheritance. And generally the courts, both of law and equity, have from early times

¹ Holmes v. Williams, 1 Root (Conn., 1795), 841; Sheldon v. Rose, 41 Conn. 371; Doe v. Dill, 1 Houst. (Del., 1856), 398; Dodd v. Dodd, 2 Houst. 76; Cordry v. Adams, 1 Harr. (Del.) 439, 441; McAleer v. Schneider, 2 App. D. C. 461; Scott v. Alexander, 2 Houst. (Del.) 241; Jones v. Bramblet, 1 Scam. (2 Ill., 1836), 276; Cleveland v. Spilman, 25 Ind. (1865), 95, 99; Korf v. Gerichs, 145 Ind. 134, 137, 44 N. E. R. 24; Ross v. Ross, 135 Ind. 367; Brand v. Rhodes' Adm'r (Ky., 1895), 30 S. W. R. 597; Arrants v. Crumley, 48 S. W. R. 842; Wilson v. Curtis, 90 Me. 463, 38 Atl. R. 365; Newton v. Griffith, 1 Har. & G. (Md.) 311; Beall v. Holmes, 6 Har. & J. (Md., 1827), 205, 208; Owings v. Reynolds, 6 H. & J. (Md.) 226; Wait v. Belding, 24 Pick. (41 Mass.) 129, 133, 139; Farrar v. Ayres, 5 Pick. (22 Mass., 1827), 404; Fearing v. Swift, 97 Mass. 413, 415; Den v. Sayre, 1 N. J. L. 598; Fogg v. Clark, 1 N. H. (1818), 163; Lummus v. Mitchell, 34 N. H. (1856), 39, 47;

Lippen v. Eldred, 2 Barb. (N. Y.) 131; Edwards v. Bishop, 4 N. Y. 62, 63; Jackson v. Wells, 9 Johns. (N. Y.) 222, 224; Jackson v. Embler, 14 Johns. (N. Y.) 198, 199; Ferris v. Smith, 17 Johns. (N. Y.) 221, 223; Harvey v. Olmsted, 1 N. Y. 483, 490; Hull v. Hull, 9 Ohio Dec. 19; Holme v. Harrison, 2 Whart. (Pa.) 283, 285; Whaley v. Jenkins, 3 Des. Eq. (S. C., 1810), 80, 84; Goodrich v. Harding, 3 Rand. (Va.) 280; Bullock v. Bullock, 8 Vin. Ab. 238, pl. 10; Roe d. v. Holmes, 2 Wils. 80 b; Doe d. Crutchfield v. Pearce, 1 Price, 353; Deacon v. Marsh, Moore, 594; Canning v. Canning, Mose. 242; Bowes v. Blackett, Cowp. 235; Denn v. Gaskin, Cowp. 657; Child v. Wright, 8 Durn. & East, 64; Compton v. Compton, 9 East. 267; Dickens v. Marshall, Cro. Eliz. 330; Richard v. Edmunds, 7 Durn. & E. 633; Viner v. Eve, 5 Ad. & Ellis, 317; Doe d. Roberts v. Roberts, 7 Mees. & W. 382.

² Post, § 684.

strained after a construction which would pass all the interest of the testator.¹

§ 680. **The effect of an introductory clause purporting to dispose of the whole estate.**—A clause of introduction, and even mere fragmentary words of introduction, stating the intention of the testator, in more or less general terms, to dispose of *his whole estate by the will* in which they are inserted, are very common. The rule is, that such an introductory clause, though clearly showing an intention to die testate as to the whole estate, does not *alone* enlarge a subsequent devise couched in indefinite language, and without words of inheritance, which at the common law would create a life estate only, to a fee simple.²

These introductory clauses and expressions are, of course, material for the court of construction to consider for the purpose of ascertaining the whole intention of the testator. They are as much a part of the will as any other clause, and, while they should not be pushed too far in an effort to ascertain the intention, if they are used with language justifying a slight inference of an intention to dispose of the fee, they ought, if possible, to be construed in assistance of it.³

Thus, for example, a clause at the beginning of a will as follows, "As touching such worldly interest as it hath pleased God to bless me with in this life, I dispose of my land as follows, etc.: I give to A. all my lands and tenements, etc., freely to be enjoyed," has been held to create a life estate only.⁴ On

¹ "I really believe that every case determined upon the rule of law directing an estate for life, if there be no limitation, defeats the intention of the testator." By Lord Mansfield, in *Mudge v. Blight*, Cowper, 352. "There is hardly a case of this sort, where only an estate for life is held to pass, but that it counteracts the testator's intention; for where a testator uses general words he means to dispose of everything he has." *Palmer v. Richard*, 8 Term R. 356.

² *Dodd v. Dodd*, 2 Houst. (Del., 1861), 76; *Wheaton v. Andress*, 23 Wend. (N. Y.) 452, 454; *Steele v. Thompson*, 14 Serg. & R. (Pa.) 84, 89; *Wyatt v.*

Stadler, 1 Munf. (Va.) 537, 543; *Burr v. Sim*, 1 Whart. (Pa.) 252, 262; *Wright v. Denn*, 10 Wheat. (23 U. S., 1825), 204; *Frogmorton v. Kershaw*, 3 Wils. 414; *Knocker v. Ravell*, 2 Crompt. & Jer. 617; *Pollard's Estate*, 3 De Gex, J. & S. 541; *Denn d. Gaskin v. Gaskin*, Cowp. 657; *Doe d. Small v. Allen*, 8 T. R. 497, 503; *Lloyd v. Jackson*, L. R. 1 Q. B. 571.

³ *Charter v. Otis*, 41 Barb. (N. Y.) 523, 529; *Jackson v. Merrill*, 6 Johns. (N. Y., 1810), 191.

⁴ *Wheaton v. Andress*, 23 Wend. (N. Y.) 452, 454; *Goodright dem. Drewy v. Barron*, 11 East, 220. Though, if the property disposed of

the other hand, in many cases where the testator has inserted an introductory clause purporting to show an intention to dispose of all his goods, and particularly where he states his intention to dispose of all his estate,¹ and then gives a piece or parcel of land in indefinite language and without words of inheritance, and also *omitting the residuary clause*, the presumption that the testator intended to create a life estate only is conclusively rebutted, and the fee will pass under the devise.²

§ 681. **The operation of the word "estate" in conveying the fee.**—The word "estate," when it is employed in a will in reference to real property, may express either the *quantity* of the interest in the real property which is devised or the *thing which is devised*. In some cases it may express both, and the sense in which it is used in any case must always be determined by the language of the will. Thus, for illustration, the testator may employ the word to describe the subject of the devise, as where he devises "*my estate at A.*," or "*my estate called A.*" The word means then that parcel of land which is owned or leased by the testator, and which is located at A., or which is called A. On the other hand, the testator may have employed the word "estate" to describe his interest in real property without reference to its location, as where he devises *all his real and personal estate* of whatsoever nature, and wheresoever located, or where, in the introductory clause of his will, he

under such a clause was charged with the payments of debts or legacies, a fee would undoubtedly pass by these words. *Lovacres d. Mudge v. Blight*, Cowp. 352.

¹ See cases cited in next note.

² *Franklin v. Harter*, 7 Blackf. (Ind., 1844), 488, 490; *Stevenson v. Druley*, 4 Ind. (1853), 519; *Pattison v. Doe*, 7 Ind. 282, 289; *Charter v. Otis*, 41 Barb. (N. Y.) 523, 529; *Cassell v. Cooke*, 8 Serg. & R. (Pa.) 268, 288; *Shriver v. Myer*, 19 Pa. St. 89; *Reimer's Estate*, 159 Pa. St. 212, 220; *Rupp v. Eberly*, 79 Pa. St. 141, 145; *Busby v. Busby*, 1 Dall. (Pa.) 226; *Waring v. Middleton*, 3 Des. (S. C.) Eq. 249, 252; *Davies v. Miller*, 1 Call (Va., 1797), 127; *Winchester v. Tilgh-*

man, 1 Harr. & McH. (Md.) 452; *Goodrich v. Harding*, 3 Rand. (Va.) 280. The introductory clause of a will recited: "Touching such worldly estate wherewith it hath pleased God to bless me. . . . I give and dispose of in the following manner." Then followed a number of legacies to each of the testator's children and heirs at law except his son, S., each bequest ending with the words "and no more." Lastly, a devise to S. of all his realty, without words of limitation, and omitting the clause "and no more." Held, that S. took a fee. *Saulsbury, Ch.*, dissenting. *Doe v. Patten* (Del., 1895), 16 Atl. R. 558.

states it to be his purpose to dispose of all *his worldly estate* by his will. In the absence of any statute creating a presumption that the testator, by general words, intended to devise all the interest which he owned, it has long been an established rule of construction that a devise of the testator's estate generally, without any words of inheritance, succession or limitation, would carry a fee simple in land.¹

And it is immaterial whether the word "estate" is employed in the dispositive portion of the will or in a clause disposing of land, or whether it is inserted in the introductory clause in the form of a statement that the will is to dispose of the testator's whole worldly estate. The English cases hold that the word "estate" will pass the fee, even though it is accompanied by words which refer to and indicate the locality and the situation of the estate, as "my estate at A." or "in A."² Thus in England, prior to the passage of the statute 1 Vict., ch. 26, which enacted that, where real estate is devised to any person

¹Hungerford v. Anderson, 4 Day (Conn., 1809), 368, 373; Warner v. Williams, 54 Conn. 470, 472, 9 Atl. R. 136; Den v. Bowne, 3 Harr. (Del., 1840), 210, 213; Donovan v. Donovan, 4 Harr. (Del.) 177, 178; Doe v. Kinney, 3 Ind. (1851), 50, 51; Doe v. Harter, 7 Blackf. (Ind.) 488; Howard v. Howard, 4 Bush (Ky.), 494, 497; Deering v. Tucker, 55 Me. (1867), 284, 287; Chamberlain v. Owings, 30 Md. (1868), 447, 455; Kellogg v. Blair, 6 Met. (Mass.) 322, 325; Godfrey v. Humphrey, 18 Pick. (35 Mass.) 537, 539; Tracy v. Kilburn, 3 Cush. (57 Mass., 1849), 557, 558; Brown v. Wood, 17 Mass. 68; Forsaith v. Clark, 21 N. H. 423; Fogg v. Clark, 1 N. H. (1818), 163; McAfee v. Gilmore, 4 N. H. 391; Leavitt v. Wooster, 14 N. H. 550, 563; Herbert v. Smith, 1 N. J. Eq. 141, 146; Norris v. Clark, 10 N. J. Eq. 51, 57; Whittaker v. Whittaker, 40 N. J. Eq. 33, 37; Carter v. Gray (N. J., 1899), 43 Atl. R. 711; Jackson v. Merrill, 6 Johns. (N. Y.) 185, 191; Jackson v. De Lancey, 11 Johns. (N. Y.) 365, 373, 13 id. 537; Jackson v. Babcock, 12

Johns. (N. Y., 1815), 389, 394; Jackson v. Robins, 16 Johns. (N. Y.) 537, 562; Charter v. Otis, 41 Barb. (N. Y.) 525, 529; Morrison v. Semple, 6 Binn. (Pa., 1813), 94, 97; Holme v. Harrison, 3 Whart. (Pa., 1836), 283, 285; Turbett v. Turbett, 3 Yeates (Pa., 1802), 187; Doughty v. Browne, 4 Yeates (Pa.), 179; Whaley v. Jenkins, 3 Desaus. (S. C.) Eq. 80, 82; Hart v. White, 26 Vt. 260, 267; Kennon v. M'Roberts, 1 Wash. (Va., 1791), 96, 104; Watson v. Powell, 3 Call (Va.), 306, 308; Stump v. Deneale, 2 Cranch, C. C. (1826), 640, 644; Archer v. Deneale, 1 Peters (26 U. S., 1828), 585, 586; Lean v. Lean, 1 Adol. & Ell. 229; Frogmorton v. Holliday, 3 Burr. 1618; Peacock v. Bishop of Lincoln, 3 Brod. & Bing. 26, 27.

²Macaree v. Tall, Amb. 181; Ibbetson v. Beckwith, Cas. Temp. Talb. 157; Fletcher v. Smith, 2 T. R. 656; Allport v. Bacon, 4 Maule & Sel. 366; Bailis v. Gale, 2 Ves. 48; Roe d. Child v. Wright, 7 East, 259; White v. Coram, 3 Kay & John. 652; Gardner v. Harding, 3 J. B. Moore, 565.

without words of limitation, such devise shall be construed to pass the fee simple, or the whole estate or interest which the testator had power to dispose of by will in such estate, unless a contrary intention shall appear by the will, a devise of "my freehold estate, consisting of thirty acres of land, situated at —, in the county of —, now in the occupation of A,"¹ or a devise of "all my estate, lands, etc., called and known by the name of Coal Yard, in the Parish of St. Giles, London,"² or a statement "I give Horsecroft my estate that I now live on,"³ carried the fee simple in the lands thus described and not merely a life interest. In each of these cases and in others which may be found in the notes, though the testator used the word "estate" as referring to a particular piece of land, it was also his intention to include under it all the interest which he holds in such parcel of land.

§ 682. **An express devise for life is not enlarged by a gift of estate.**—If the testator devises lands in terms expressly for life, the fact that he also, in the same clause, employs the words "my estate and interest in the land" does not raise the devise of the life interest in that property to a fee simple.⁴ But generally the word "estate" may be limited in its meaning by the context, so that the devisee of the estate will not take the fee simple. Thus, where a testator gave all of his estate to A., with a limitation over in case *A. should die under twenty-one*,⁵ and where he devised property to A. for life, and at his death he gave the estate to B.,⁶ it was held that the word "estate" did not convey the fee simple. Independently of statute it is a rule that a devise of the remainder⁷ or of the reversion⁸ of the estate, or of the lands of the testator, would pass the fee simple in those lands, provided he owned it. But, on the other hand, it seems to have been the rule at common law that the terms "residue" and "remainder," constituting a residuary clause, will not convey the fee, but that the residuary devisee

¹ Gardner v. Harding, 3 J. B. Moore, 565.

² Roe d. Childs v. Wright, 7 East, 259.

³ Doe d. Potter v. Fricker, 6 Ex. 510.

⁴ Bowes v. Blacket, Cowp. 235; Norris v. Tucker, 2 Barn. & Adol. 473.

⁵ Bruce v. Bainbridge, 5 J. B. Moore, 1, 2 Br. & Bing. 123.

⁶ Key v. Key, 4 De Gex, M. & G. 73.

⁷ Norton v. Ladd, 1 Lutwyck, 755; Baker v. Wall, 1 Ld. Raym. 187.

⁸ Bailis v. Gale, 2 Ves. 48.

will take a life estate only in the lands comprised in the residuary clause.

§ 683. **Fee simple in the beneficial interest created by devise in trust.**—It is a well settled principle of construction both at law and in equity, that under a devise to trustees of a legal *estate in fee for the benefit of A.*, or for the benefit of a class of persons, the testator will be presumed to intend that the beneficiaries shall take an equitable interest in the property of precisely the same extent as the legal interest which is expressly vested in the trustees. This rule is recognized where the testator has neglected to point out the character and extent of the equitable interest of the beneficiaries, in the absence of an expression of a contrary intention showing that he intended them to take less than a fee.¹

§ 684. **Words of inheritance not necessary to create a fee at common law.**—So far as devises were concerned, it was never necessary, independently of statute, to carry the fee that the testator should employ words of inheritance or succession in a devise of his land.² If the language of the testator used in the will was sufficient to show clearly that he intended to convey the whole estate or property which he owned, the fee would pass.³ Thus a devise to A. “in fee simple,”⁴ to A. and “his successors,”⁵ or a direction that A. “shall have my inheritance,”⁶ or to “A. forever,”⁷ or to A., to “him and his assigns forever,”⁸ or a statement that “I make A. my heir,”⁹ or a gift to A. to be disposed of at his pleasure,¹⁰ or to A. and his family,¹¹ or to a man and his executors,¹² and generally a gift which showed that the devisee was to have full power *in perpetuity*

¹ Newland v. Sheppard, 2 P. W. 194, St. 480, 488; Boutelle v. Bank, 24 Atl.

2 Eq. Cas. Ab. 329; Knight v. Selby, R. 838, 17 R. L. 781.

3 Man. & Granger, 92; Hodson v. Ball, 4 Baker v. Raymond, 8 Vin. Ab. 206, pl. 8.

14 Sim. 558; Moore v. Cleghorn, 10 Beav. 427; Yarrow v. Knightly, L. R.

8 Ch. 736; Peat v. Powell, Amb. 387. Cf. post, § 781.

² 2 Black. Com., p. 108.

³ Faitman v. Beal, 14 Ill. 244; Benkert v. Jacoby, 86 Iowa, 273, 275; Lincoln v. Lincoln, 107 Mass. 590, 591; Sweet v. Chase, 2 N. Y. 73, 79; Barheydt v. Barheydt, 20 Wend. (N. Y.) 576, 581; Thompson v. Hook, 6 Ohio

St. 480, 488; Boutelle v. Bank, 24 Atl. R. 838, 17 R. L. 781.

⁴ Baker v. Raymond, 8 Vin. Ab. 206, pl. 8.

⁵ 1 Rolle, 399.

⁶ Widlake v. Harding, Hobart 2, 2a.

⁷ Co. Lit. 9b; 8 Vin. Ab. 206, pl. 6; Chamberlain v. Turner, Cro. Car. 129.

⁸ Co. Lit. 9b.

⁹ Spark v. Purnell, Hobart, 75a.

¹⁰ Jennar v. Hardies, 1 Leon. 283.

¹¹ Chapman's Case, Dyer, 33; Wright v. Atkins, 17 Ves. 261.

¹² Roe d. Vere v. Hill, 3 Burr. 1881.

to sell, incumber or dispose of the same by will at his death, gave him a fee.¹

§ 685. A direction to the devisee of land to pay debts and legacies may enlarge his estate to a fee.—A condition that A., to whom land is devised in general language without words of limitation, shall pay the debts of the testator, or shall pay one or more legacies given in the will, enlarges his estate into a fee simple. A direction, a request, or an expression of a wish, that such a person shall pay debts or legacies, if it appears upon the whole will to be equivalent to a command or direction, will be regarded as creating a condition, and will have the same effect upon the character of the interest which the devisee takes in the land as though it were a condition. This exception to the general rule is based upon the presumption that if the general rule be applied, under which the devisee of land given in indefinite language would take a life estate, he would in all probability be a loser. His estate might terminate by his death before it had continued long enough to reimburse him for the outlay incurred in carrying out the testator's directions or commands.²

¹ But at common law, where land was given to a person in language without words of inheritance to be freely possessed and enjoyed by him, only a life estate passed. *Goodright d. Drewry v. Barron*, 11 East, 220; *Ashby v. Baines*, 2 Crom., M. & R. 28; *Bromit v. Moore*, 9 Hare, 378. *Contra*, *Timewell v. Perkins*, 2 Atk. 103.

² *McRee v. Means*, 34 Ala. (1859), 377; *Benkert v. Jacoby*, 36 Iowa, 273, 275; *Doe v. Dill*, 1 Houst. (Del.) 398; *Donohue v. Donohue*, 54 Kan. 136, 140, 37 Pac. R. 998; *Lindsay v. McCormack*, 2 A. K. Marsh. (9 Ky., 1820), 229; *McLellan v. Turner*, 15 Me. 436, 438; *Beall v. Holmes*, 6 Harr. & J. (Md., 1859), 205, 208; *Glenn v. Spry*, 5 Md. 110, 113; *Gibson v. Horton*, 5 Harr. & J. (Md.) 177, 180; *Snyder v. Nesbitt*, 77 Md. 576, 581, 26 Atl. R. 1006; *Wait v. Belding*, 24 Pick. (Mass.) 129, 139; *Bowers v. Porter*, 4 Pick. 198; *Curtis v. Fowler*, 66 Mich. 696, 33 N. W. R. 804; *Bell v. Scammon*, 15

N. H. (1844), 381, 390; *Lummas v. Mitchell*, 34 N. H. (1856), 39, 47; *Leavitt v. Wooster*, 14 N. H. 550, 562; *Tator v. Tator*, 4 Barb. (N. Y., 1848), 431, 437; *Dumond v. Stringham*, 26 Barb. (N. Y.) 104; *Jackson v. Merrill*, 6 Johns. (N. Y., 1810), 185, 191; *Jackson v. Bull*, 10 Johns. (N. Y.) 148, 151; *Jackson v. Staats*, 11 Johns. (N. Y.) 337; *Olmstead v. Olmstead*, 4 N. Y. (1851), 56, 58; *Harvey v. Olmsted*, 1 N. Y. 483, 490; *Wheaton v. Andress*, 23 Wend. (N. Y.) 452, 454; *Barheydt v. Barheydt*, 20 Wend. (N. Y.) 500; *Niles v. Gray*, 12 Ohio (1843), 328; *Harden v. Hays*, 9 Pa. St. (1848), 151; *Fahrney v. Holsinger*, 65 Pa. St. 388; *King v. Cole*, 6 R. I. 584; *Abbott v. Essex*, 2 Curt. C. C. 126, 18 How. (U. S.) 202; *Kennon v. M'Roberts*, 1 Wash. (Va.) 96, 99; *Gardner v. Gardner*, 3 Mason, 211; *Wright v. Denn*, 10 Wheat. 231; *Doe v. Holmes*, 8 Durn. & East, 1; *Lloyd v. Jackson*, L. R. 1 Q. B. 571; *Goodtitle v. Maddern*, 4

It does not seem to be material that the amount which the devisee has to pay is so small as compared with the income of the life estate in the property that he will not lose anything; for this circumstance, while it renders it impossible that he shall lose, does not prevent the charge from making him the owner in fee simple of the estate.¹ So too, generally, the fact that the direction given the devisee to pay is upon a contingent event does not prevent the enlargement of his estate into a fee simple. For, upon principle and upon the authorities, it is not so much the *actual fact* that the devisee will be a loser if he takes only a life estate, but the *possibility* that he will be a loser. As a matter of fact, the exception made where there is a direction to pay is based solely on the inclination of the courts to avoid the operation of an extremely technical common-law rule, which in most cases overthrows the intention of the testator. This being so, the courts will not distinguish between a case where there is an *absolute* direction to pay, and one where the carrying out of the direction is contingent upon some other event.

If the devisee to whom the land is given is in the same will appointed an executor, and he is directed to pay the debts of the testator simply, it will be presumed that he was directed to pay them *as the devisee* of the land, not as the executor. Such being the case, he will take the fee in the land.² This exception, by which a devise in indeterminate language is enlarged into a fee-simple estate, is only applicable where the direction to pay *imposes a personal obligation to pay upon the devisee* of the land. It does not apply at all where lands are devised in indefinite language to a person *after* the payment of debts of the testator, *or after* the payment of his debts and

East, 496, 500; Moore v. Denn, 2 Bos. & Pul. 247; Doe v. Clarke, 5 Bos. & Pul. 343, 9 N. R. 849; Wellock v. Hammond, Cro. Eliz. 204; Greeve v. Dewell, Cro. Jac. 599; Moone v. Heasemann, Willes, 138; Loveacres v. Blight, Cowp. 356; Doe v. Richards, 3 T. R. 356; Stevens v. Snelling, 5 East, 87; Colyer's (Collier's) Case, 6 Coke, 16; Co. Litt. 9b, 6 Rep. 16a; Blinston v. Warburton, 2 Kay & John, 400.

¹ Co. Lit. 9b; 6 Rep. 16a; Cro. Eliz.

379; Moone v. Heaseman, Willes, 138; Doe v. Holmes, 8 T. R. 1; Goodtitle v. Maddern, 4 East, 496. But a devise of a life estate in express terms is never enlarged to a fee by a trust to pay the debts of the testator or to pay a legacy, or to support a legatee. Goodell v. Hibbard, 32 Mich. 47; Gauler v. Moran, 66 Mich. 353.

² Dolton v. Hower, 6 Maddock, 9; Johnson v. Brady, L. R. 11 Eq. 386.

specified legacies, where the debts are charged only on the land.¹

§ 686. A power of disposal may raise a fee by implication. A devise of land not expressly by terms of limitation, inheritance or succession creating a fee may be raised to a fee simple if the testator gives the devisee *an absolute and unrestricted power of disposing of the land*. It is not meant to say that this is the case where an estate is *expressly* given for the life of the devisee. But where no words of limitation defining the quantity of the interest given are inserted, and whether or not the common-law rule which is applicable to estates in indeterminate language is to be applied, the fact that an absolute power in full discretion of disposing of the land in fee is given is always a strong circumstance, and is usually conclusive, to show that the testator intended the devisee to take the fee of the land.²

¹ Scott v. Alexander, 2 Houst. (Del.) 241; Franklin v. Harter, 7 Blackf. (Ind., 1844), 438; McLellan v. Turner, 15 Me. (1839), 436, 438; Olmstead v. Olmstead, 4 N. Y. 56, 57; Jackson v. Staats, 11 Johns. (N. Y., 1814), 337, 348; Jackson v. Bull, 10 Johns. (N. Y.) 148, 151; Heard v. Horton, 1 Denio (N. Y.), 166; Spraker v. Van Alstyne, 18 Wend. (N. Y.) 200; Mesick v. New, 7 N. Y. (1852), 165; Van Dyke v. Emmons, 34 N. Y. 186; Vanderzee v. Vanderzee, 36 N. Y. 232; Calhoun v. Cook, 9 Pa. St. (1848), 226; Mooberry v. Marye, 2 Munf. (Va.) 453; Markwell v. Thorn, 28 Wis. 548; Moor v. Miller, 5 T. R. 558; Dickens v. Marshall, Cro. Eliz. 330; Doe v. Allen, 8 T. R. 497. "It has long been established that a condition or a direction imposed on a devisee enlarges a devise without words of limitation to an estate in fee simple. The ground upon which this rule of construction has been established is that, unless the devisee were to take a fee, he might in the event be a loser by the devise, since he might die before he had reimbursed himself the amount of the charge, and it applies, therefore, to

every case in which a loss is possible. But cases in which the charge is imposed on the devisee are carefully to be distinguished from those in which it is thrown upon the land simply; for in the latter case, as the testator's expressions only require that the incumbrance should attach in whatever hands the estate may fall, no ground exists for enlarging the estate of any devisee. If, however, the sum be payable by the devisee, though charged on the lands, he takes a fee, but not on the ground applicable to charges imposed simply on the devisee, that he might otherwise sustain a loss — for, if the payment be out of the land, he cannot possibly be damnified, — but because the deviser has imposed upon him a duty the execution of which requires that he should take a fee." Cook v. Holmes, 11 Mass. 532 (1814), note cited with approval in Snyder v. Nesbitt, 77 Md. 576, 581.

² Bolman v. Lohman, 79 Ala. 63; Benkert v. Jacoby, 36 Iowa, 273, 275; Christy v. Pulliam, 17 Ill. (1858), 59; Markillie v. Regland, 77 Ill. 98; Funk v. Eggleston, 92 Ill. 515; Sheets v.

The conferring of such an absolute power of disposition and control over the property can amount to nothing less than a gift of the fee. But if land be devised to a person expressly *for life only*, in certain and definite language, with a power of use or disposal, an estate for life only passes. The intention to create an estate for life shown by the express language which is employed will prevail over the inference which may be created by the gift of the power; and if the devisee dies without exercising the power, the reversion of the fee will descend to the heirs of the testator, or it will go to the devisee of the testator as a contingent remainder or executory devise, if he has devised it over. In either event no estate in the land will pass *under the power* until it has been executed.¹ Hence, therefore,

Wetzel, 39 Ill. App. 600; Silvers v. Canary, 109 Ind. (1886), 267; Moore v. Webb, 2 B. Mon. (Ky.) 282, 283; Ramsdell v. Ramsdell, 21 Me. (1842), 288; Pickering v. Langdon, 22 Me. 413; Shaw v. Hussey, 41 Me. 495, 498; Swope v. Swope, 5 Gill (Md., 1847), 225; Lyon v. Marsh, 116 Mass. 232, 233; Rubey v. Barnett, 12 Mo. (1848), 8; Hazel v. Hagan, 47 Mo. 277, 281; Gaven v. Allen, 100 Mo. 293, 13 S. W. R. 501; Den v. Young, 23 N. J. L. 478, 481; Borden v. Downey, 35 N. J. L. 74, 36 N. J. L. 460, 467; Lienau v. Summerfield, 41 N. J. Eq. 381; Den v. Humphreys, 16 N. J. L. (1837), 25; Cordry v. Adams, 1 Harr. (Del.) 439, 441; Banzer v. Banzer, 51 N. E. R. 291, 156 N. Y. 429; Doe v. Howland, 8 Cow. (N. Y.) 277, 285; McLean v. Macdonald, 2 Barb. (N. Y.) 534; Bradstreet v. Clarke, 12 Wend. (N. Y., 1834), 602; Macdonald v. Walgrove, 1 Sandf. Ch. (N. Y.) 274; Jackson v. Coleman, 2 Johns. (N. Y., 1807), 391; Doughty v. Browne, 4 Yeates (Pa., 1805), 179, 181; Culbertson v. Duly, 7 Watts & S. (Pa., 1844), 295, 297; Morris v. Phaler, 1 Watts (Pa., 1833), 389; Smith v. Fulkinson, 25 Pa. St. 109; Purcell v. Wilson, 4 Gratt. (Va.) 16; Guthrie v. Guthrie, 1 Call (Va.), 7; Stowell v. Hastings, 59 Vt. 494; Wilmoth v. Wilmoth, 34 W. Va. 426; Smith v. Beards-

ley, 51 Fed. R. 122, 2 C. C. A. 118, 4 U. S. App. 580. Under a will giving to testator's wife all his property "during her natural life, and at her death she can dispose of the property as she wants to," she has an unlimited power of disposition, and can dispose of the property by deed before her death. Moseley v. Stewart, 52 S. W. R. 671; Burney v. Moseley, id.

¹Patty v. Goolsby (Ark.), 9 S. W. R. 846, 51 Ark. 61; Morffew v. San Francisco R. R. Co., 107 Cal. 587, 596, 40 Pac. R. 810; Hall v. Culver, 34 Conn. (1867), 404; Glover v. Stillwell, 56 Conn. 316, 318, 15 Atl. R. 752; Peckham v. Lego, 57 Conn. 553 (1889), 19 Atl. R. 392; Wilder v. Holland, 29 S. E. R. 134, 135; Fairman v. Beal, 14 Ill. (1852), 244; Pulliam v. Christy, 19 Ill. (1857), 331, 334; Boyd v. Strahn, 36 Ill. 355; Mulberry v. Mulberry, 50 Ill. 67; Funk v. Eggleston, 92 Ill. 515, 533; Healy v. Eastlake, 152 Ill. 424; Kaufman v. Breckenridge, 177 Ill. 305; Skinner v. McDowell, 169 Ill. 365, 369, 48 N. E. R. 310; Henderson v. Blackburn, 104 Ill. 227; Griffin v. Griffin, 141 Ill. 373, 31 N. E. R. 131; Frazier v. Hassey, 43 Ind. (1873), 310; Dunning v. Vandusen, 47 Ind. (1874), 423; Martz v. Sedam, 67 Ind. (1879), 216; Jenkins v. Compton, 123 Ind.

in the case of real property, if the life tenant who has a power of disposal has not disposed of the same during his life in accordance with the power conferred upon him by the testator, the fee simple in the same will not go to his heirs, but it will go to the persons who are appointed as executory devisees by the testator.

§ 687. **Life estate with power of sale for support.**—A devise in language which *clearly creates an estate for the life of a devisee*, with full power in the life tenant to dispose of the fee of the property and to use the proceeds thereof for his or her support, or to use as much as he may need, with a limitation over of "*what remains*" at his death, does not, of necessity, create an absolute estate in fee simple in the first taker. If it is clearly apparent that the testator intended he should take only a life estate, and the property is *to be used for his support and maintenance*, his interest, at least where real property is concerned, will be confined to that, though he will have a power of disposition over the fee, and a right to use the proceeds during his life for his support or for other purposes intended by the testator.

The proviso that "*what remains*" shall vest in others after

- 117, 23 N. E. R. 1091; Benkert v. Norcum v. D'Oench, 17 Mo. 98; Brammel v. Adams (Mo., 1898), 47 S. W. R. 931; Rail v. Dotson, 14 Sm. & M. (22 Miss.) 176; Dean v. Munally, 36 Miss. 358; Edwards v. Gibbs, 39 Miss. 166; Borden v. Downey, 35 N. J. L. 74; Maxwell v. McCreery (N. J., 1893), 41 Atl. R. 498; Wooster v. Cooper, 53 N. J. Eq. 682, 33 Atl. R. 1050; Rood v. Watson, 54 Hun, 85, 7 N. Y. S. 212; In re Cager's Will, 111 N. Y. 343, 18 N. E. R. 866; Kendall v. Case, 84 Hun, 124, 32 N. Y. Supp. 553; Goetz v. Ballou, 19 N. Y. S. 433, 64 Hun, 490; Jackson v. Robins, 16 Johns. (N. Y.) 537, 538; Ryan v. Mahan, 39 Atl. R. 893; In re Schmid's Estate (Pa. St., 1898), 37 Atl. R. 928; Kennedy v. Kennedy, 159 Pa. St. 327, 33 W. N. C. 478, 28 Atl. R. 241; Scott v. Burt, 9 Rich. (S. C.) Eq. 358; Pillow v. Rye, 1 Swan (Tenn.), 185.
- 117, 23 N. E. R. 1091; Benkert v. Jacoby, 36 Iowa, 273, 275; Payne v. Johnson, 95 Ky. 183, 184; Ramsdell v. Ramsdell, 21 Me. 288; Shaw v. Hussey, 41 Me. 495, 499; Nash v. Simpson, 78 Me. 142, 147; Bowman v. Pinkham, 71 Me. (1880), 295, 300; Jones v. Leeman, 69 Me. (1879), 489; Hatch v. Caine, 86 Me. 282, 29 Atl. R. 1076; Benesch v. Clark, 49 Md. (1878), 497; Stafford v. Martin (Md.), 23 Atl. R. 734; Keniston v. Mayhew, 169 Mass. 166, 47 N. E. R. 612; Parker v. Parker, 5 Met. (Mass.) 134; Hatfield v. Sohler, 114 Mass. 48; Smith v. Snow, 123 Mass. 323; Morford v. Dieffenbacher, 54 Mich. 594; Goodell v. Hubbard, 32 Mich. 47; Gauklin v. Moran, 66 Mich. 353; In re Gillam's Estate (Minn., 1898), 63 N. W. R. 1028; Groffet v. William, 114 Mo. 106, 21 S. W. R. 459; Rubey v. Barnett, 12 Mo. 3; Swearingen v. Taylor, 14 Mo. 391;

his death does not curtail his power of disposal of the fee; but where the power of sale or disposal is not exercised by the life tenant during his life, the lands included in the devise, and which remain unsold at his death, do *not descend to his heirs*, but they go to the remaindermen who are mentioned in the will of the testator. The extent of the power of disposition, if its limits are not expressly marked out by the testator, will depend upon the nature of the property and upon the uses to which it is adapted. If the primary purpose of the devise is the support of the life tenant, and the remainder of the property which is not consumed by him for that purpose is given over to others upon his death, the life tenant may sell the land and he may use the proceeds of the sale for his support. He may not use the proceeds for another purpose; he cannot give them away;¹ nor can he devise the land;² nor can the fee be sold by his creditors.³

And those persons who take whatever property remains unused at the termination of the life estate do not, of course, though they may be the heirs of the first taker, take from him by descent, but as purchasers and remaindermen under the will of the testator.⁴

¹Schnard v. Specht, 180 Ill. 208.

²Munro v. Collins, 95 Mo. 33, 7 S. W. R. 461; Baumgras v. Baumgras, 24 N. Y. Sup. 767, 5 Misc. R. 8; Griffin v. Griffin, 141 Ill. 373; Johnson v. Johnson, 51 Ohio St. 446, 38 N. E. R. 61; In re French, 52 Hun. 303, 5 N. Y. Supp. 249; In re Steinmetz' Estate, 31 Atl. R. 1070, 168 Pa. St. 171, 36 W. N. C. 377.

³Rose v. Hatch, 125 N. Y. 427.

⁴Giles v. Little, 104 U. S. 291, 297; Elyton Land Co. v. McElrath, 3 C. C. A. 649, 53 Fed. R. 763; Pendley v. Madison, 3 S. R. 618, 83 Ala. 848; Funk v. Eggleston, 92 Ill. 515; Pritchard v. Walker, 22 Ill. App. 286, 12 N. E. R. 336, 121 Ill. 221; Wood v. Robertson, 113 Ind. 323, 15 N. E. R. 457; Crew v. Dixon, 129 Ind. 85, 27 N. E. R. 728; Rusk v. Rusk (Ind., 1897), 45 N. E. R. 691; Wiley v. Gregory, 135 Ind. 647, 35 N. E. R. 507; In re Foster's Will,

76 Iowa, 364, 41 N. W. R. 43; Greve v. Camery, 69 Iowa, 220, 221, 28 N. W. R. 564; Mack v. Proctor, 95 Iowa, 172, 68 N. W. R. 670; Williams v. Philips, 34 Kan. 514, 516-519; Stuart v. Walker, 72 Me. 145, 153; Copeland v. Barren, 72 Me. 206, 209; Billings v. Billings, 110 Mass. 225, 227; Brady v. Brady, 78 Md. 461; Chase v. Ladd, 155 Mass. 417, 29 N. E. R. 637, 26 N. E. R. 429, 153 Mass. 125; Harbison v. James, 2 S. W. R. 292, 90 Me. 411; Munro v. Collins, 95 Mo. 33, 7 S. W. R. 461; Redman v. Barger, 24 S. W. R. 177, 118 Mo. 568; Evans v. Folks, 135 Mo. 397, 37 S. W. R. 126; Glover v. Reid, 80 Mich. 228, 45 N. E. R. 91; Langley v. Tilton (N. H., 1897), 36 Atl. R. 610; Kimball v. New Hampshire Bib. Soc., 23 Atl. R. 84, 65 N. H. 139; Stevens v. Flower, 46 N. J. Eq. 340, 19 Atl. R. 777; Bradway v. Holmes, 50 N. J. Eq. 311, 25 Atl. R. 196; Robeson v. Shot-

For, if the power of the life tenant to dispose of the fee of the land for the purpose which is pointed out by the testator has to be executed during his life-time, and he fails or refuses to execute it for *that* purpose, the power is extinguished by his death, and the fee passes under the will to the remaindermen. The power which is annexed to the life estate, and by which

well (N. J., 1897), 36 Atl. R. 730; Thomas v. Welford, 49 Hun, 145, 1 N. Y. Supp. 610; Dwyer v. Wells, 25 N. Y. Supp. 59, 5 Misc. R. 18; Crozier v. Bray, 120 N. Y. 366, 24 N. E. R. 712; Smithers v. Moody, 112 N. C. 791, 17 S. E. R. 532; Taylor v. Bell, 28 Atl. R. 208, 158 Pa. St. 651, 33 W. N. C. 529; Cox v. Sims, 125 Pa. St. 522, 17 Atl. R. 465; Pierce v. Simmons, 17 R. I. 545, 23 Atl. Rep. 638; In re Lewis, 17 R. I. 642, 24 Atl. R. 146; Dye v. Beaver Cr. (S. C., 1897), 26 S. E. R. 717; Young v. Mut. L. I. Co. (Tenn., 1898), 47 S. W. R. 428; Thrall v. Spear, 63 Vt. 266, 22 Atl. R. 414; Larsen v. Johnson, 78 Wis. 300, 306. A devise "to E. for her own use and benefit, and also to make such disposition of the same that she, in her judgment, may deem best, should it become necessary that a part or all should be employed for the support of herself and W. . . . After the death of said E., I will and devise that any and all property remaining unused shall be given to said W.," gives E. only a life estate with a power of disposal for the support of herself and W., and on the death of E. the remainder to the latter goes into effect. Miller's Adm'r v. Potterfield, 86 Va. 876, 11 S. E. R. 486. A devise in the following language: "I also give, devise and bequeath to A. all the rest, residue and remainder of my estate, but on her decease I give the remainder thereof, if any, to my children," vests in A. a life estate and a remainder in fee to the children, subject to a power of sale to be exercised during the life of A. for her benefit. Leggett v. Frith,

29 N. E. R. 950, 132 N. Y. 7, 6 N. Y. S. 158. See also Munro v. Collins, 95 Mo. 33, 7 S. W. R. 461, where the devise was "to be held and enjoyed by her as her own, with this request: that the real estate shall be properly cared for, building kept in repair, and taxes promptly paid; and after her death such of said property as shall then be in her possession I request shall be given to our adopted daughter, to be hers absolutely." Any proceeds of the sale of land which have not been used by the devisee for his support during his life belong to those persons who are to take next in succession, and in default of such to the personal representatives of the testator. Chase v. Ladd, 155 Mass. 417, 29 N. E. R. 637. The tenant of a life estate with a power of disposal for certain purposes, set forth in the will, must act within the scope and limitations of his powers. If the sale is permitted to be made for his support he must show that it is necessary or the sale will be invalid. He can only dispose of the land so far as may be needed to secure a reasonable support and maintenance for himself. Chase v. Ladd, 26 N. E. R. 429, 153 Mass. 126; Swarthout v. Renier, 143 N. Y. 499, 38 N. E. R. 726, 22 N. Y. Supp. 198; Larsen v. Johnson, 78 Wis. 300, 47 N. W. R. 615; In re Wyatt, 9 Misc. R. 285, 30 N. Y. Supp. 275; Peckham v. Lege, 57 Conn. 553, 19 Atl. R. 392. See also Hall v. Otis, 71 Me. 326, 330; Paxton v. Bond (Ky.), 15 S. W. R. 875; Griffin v. Griffin, 141 Ill. 373.

the life tenant is authorized to dispose of the property *if it shall be necessary to do so* in order to provide for his or her support, or for the support of his or her children, will not enable him to dispose of the fee until the necessity for support arises.¹ When that arises he has an absolute power of disposal over the fee simple of the property, but in no case does he own the fee simple by reason of such a power being attached to his life estate for any other purpose than his support.² And the necessity for a sale in order that he may be supported, or in order that the education or support of his children may be provided for, is a condition precedent to the execution of the power to dispose of the *corpus* or fee of the estate. The power must be properly exercised, and the result of the disposal of the property must be protected from waste by the life tenant, in case, as usually happens, the testator has devised to others whatever may remain after his death.³

¹Price v. Bassett, 168 Mass. 598, 47 N. E. R. 243.

²A power to sell and to use the proceeds for support, with a power of appointment by will among the children of the life tenant, does not permit the life tenant to sell for a merely nominal consideration, or to make a gift of the property. Sires v. Sires, 43 S. C. 266, 21 S. E. R. 115.

³Gaffield v. Plummer (Ill., 1898), 51 N. E. R. 749; Henderson v. Blackburn, 104 Ill. 227; Kaufman v. Breckinridge, 177 Ill. 305; Turner v. Wilson, 55 Ill. App. 543; Goudie v. Johnson, 104 Ind. 427; Bond v. Meier, 47 Iowa, 607, 610; Graham v. Batner (Ky., 1897), 37 S. W. R. 583; Scott v. Perkins, 28 Me. 22, 35; Parks v. Am. H. M. Soc., 20 Atl. R. 107 (Vt., 1897); Jones v. Denning, 9 Mich. 481; Marford v. Dieffenbach, 54 Mich. 605; Minot v. Prescott, 14 Mass. 496; Whitcomb v. Taylor, 122 Mass. 243, 248; Barnforth v. Barnforth, 123 Mass. 280, 282; Stevens v. Winship, 1 Pick. (Mass.) 317, 318; Johnson v. Battelle, 125 Mass. 453, 454; Larned v. Bridge, 17 Pick. (Mass.) 330; Smith v. Show, 123 Mass. 323, 324; Cutting v. Cutting,

86 N. Y. 522; Terry v. Wiggins, 47 N. Y. 512; In re Blauvelt, 15 N. Y. S. 586, 60 Hun, 394; Bishop v. Remple, 11 Ohio St. 277; In re Martin's Estate, 28 Atl. R. 575, 160 Pa. St. 32, 34 W. N. C. 157; Murray v. Black, 87 Wis. 566, 572; Larsen v. Johnson, 78 Wis. 300, 307; Jones v. Jones, 66 Wis. 310, 28 N. W. R. 177. Though in terms the will creates only a life estate in the first taker, and directs that *what remains* shall go over to the others on his death, under a general power of disposal for his support, he may sell or mortgage the fee. Jeslin v. Rhodes, 150 Mass. 301, 23 N. E. R. 42; Fink v. Leisman (Ky.), 39 S. W. R. 6; Coates v. Railroad Co., 92 Ky. 263, 17 S. W. R. 564; Sarthout v. Renier, 67 Hun, 241, 22 N. Y. S. 198. He may use the proceeds for whatever purpose he has been directed to use them by the testator, but whatever he has not thus used, at his death, goes not to his next of kin, but to the remaindermen. In re Blauvelt's Estate, 2 Con. Sur. 458, 20 N. Y. Supp. 119. Where, under the will and codicil, the widow took a life estate, with an unlimited power to dispose of any

§ 688. A life estate with power of appointment by will.—A devise of a life interest in express terms, coupled with a power in the life tenant to dispose of the fee simple in the property by his will, either absolutely and at his full discretion among a class of objects to be selected by him, or among a class of objects pointed out by the testator, gives the first taker a life estate only, but with a power to appoint the fee simple by his will.¹

portion of it "for her benefit, so far as she may deem necessary," she was the absolute judge of the necessity; but this power of disposal must, because of the provision in the will, be exercised during the enjoyment of the life estate, except to the extent of the payment of debts owing by the life tenant at the time of her death, and her funeral expenses. *Small v. Thompson*, 43 Atl. R. 509, 92 Me. 539. Where the devisee is permitted to use as much of the principal as may be necessary for his expenses, he may use the entire amount if in his judgment it becomes necessary. *McCarty v. Fish*, 87 Mich. 48, 49 N. W. R. 513. And if the power of disposal is merely a general power, not evincing an intention to confer the power to use the proceeds of the sale for support, the life tenant has the power of disposal by sale or pledge, and of re-investing the proceeds in new securities. *Glover v. Stillson*, 56 Conn. 316, 15 Atl. R. 752; *Trimble's Ex'x v. Lebus*, 94 Ky. 304, 22 S. W. R. 329.

¹ *Christy v. Ogle*, 33 Ill. (1864), 295; *Wood v. Robinson*, 113 Ind. 323, 324; *Crew v. Dixon*, 129 Ind. 85, 89; *Morgan v. Halsey*, 97 Ky. 789, 31 S. W. R. 866; *Degman v. Degman* (Ky., 1896), 34 S. W. R. 523; *Payne v. Johnson Heirs*, 95 Ky. 165 (1894), 24 S. W. R. 238, id. 609; *Ernest v. Foster* (Kan., 1897), 49 Pac. R. 527; *Albert v. Albert*, 68 Md. 352 (1887), 12 Atl. R. 11; *Franke v. Auerbach*, 72 Md. (1890), 580, 29 Atl. R. 129; *Collins v. Wickwire*, 38 N. E.

R. 365, 162 Mass. 145; *Todd v. Sawyer*, 147 Mass. 570, 17 N. E. R. 527; *Phelps v. Phelps*, 143 Mass. 570, 10 N. E. R. 452; *Senfert v. Hensler*, 52 N. J. Eq. 754, 29 Atl. R. 202; *In re Gardner*, 140 N. Y. 122, 85 N. E. R. 439, 23 N. Y. Supp. 429; *Forsythe v. Forsythe*, 108 Pa. St. 129; *Dillon v. Faloan*, 158 Pa. St. 468, 27 Atl. R. 1082; *In re Levy's Estate*, 25 Atl. R. 1068, 153 Pa. St. 174, 31 W. N. C. 539; *Long v. Waldraven*, 18 S. E. R. 251, 113 N. C. 337; *Sires v. Sires*, 43 S. C. 266, 21 S. E. R. 115; *Hood v. Haddon*, 82 Va. 588. The testator devised his farm to his wife, during her life, for a home for her and children, and provided that if she should die before the youngest child reached its majority it should not be sold until then, and that it then be sold and the proceeds divided equally between the children. *Held*, that the widow took a life estate which she might alienate, and which estate was not conditioned on her occupancy of the farm as her home. *Talbott v. Schneider*, 52 S. W. R. 203. A devise in these words: "I give and devise unto my wife" certain described land, "to hold, to her and her assigns, for and during her natural life, she paying the taxes thereof and keeping the buildings in repair; the aforesaid land to be disposed of at the pleasure of my beloved wife at her death,"—gives the wife the power to devise the fee. *Forsythe v. Forsythe*, 108 Pa. St. 129, followed. *Dillon v. Faloan*, 27 Atl. R. 1082, 158 Pa. St. 468.

The power to appoint by will must be executed in accordance with the directions of the testator. It does not, in the absence of statute, enlarge a life estate given in express terms to an estate in fee simple. The life tenant having a power to devise has no power thereby to convey by instrument *inter vivos*;¹ nor will the heirs or next of kin of the life tenant, having a power of appointment by will, take by descent or by devolution from their ancestor in case he shall have died without having executed the power. The power to appoint by will must be executed among the class of objects selected by the first testator, and in default of a valid appointment the fee will pass to the residuary devisee; or if, as is usually the case, the donee of the power is also the residuary devisee, then the fee will pass to the heirs of the testator,² or to the persons to whom it has been devised by him in fault of an appointment.³

§ 689. A devise in fee simple not cut down by a devise over of "what remains."—It is the rule that where property is given in clear language *sufficient to convey an absolute fee*, the interest thus given shall not be taken away, cut down or diminished by any subsequent vague and general expressions.⁴ This rule is applied where a fee is given either expressly by words of limitation, as to a person and *his heirs*, or by implication by a devise in general language through the operation of the modern statutes. If it is clearly the intention of the testator that the devisee *shall own the fee simple*, his subsequent

¹ See *post*, § 800.

² *Senfert v. Hensler*, 52 N. J. Eq. 754, 29 Atl. R. 202.

³ *Crew v. Dixon*, 129 Ind. 85, 89; *Payne v. Johnson's Heirs*, 95 Ky. 165, 24 S. W. R. 609; *Morgan v. Halsey*, 97 Ky. 789, 31 S. W. R. 866; *Collins v. Wickwire*, 162 Mass. 143, 38 N. E. R. 365; *In re Gardner*, 35 N. E. R. 439, 140 N. Y. 122; *Kibler v. Huver*, 10 N. Y. Supp. 375; *Log v. Waldrave*, 18 S. E. R. 251, 118 N. C. 837; *Sires v. Sires*, 21 S. E. R. 115, 43 S. C. 266; *Rusk v. Zuck* (Ind., 1897), 46 N. E. R. 674. By statute in New York (1 R. S., p. 733, § 34), it is provided that a general power to devise, given to a life tenant, shall be deemed to convey to

him the absolute power of disposal and to create in him a fee simple which descends to his heirs on his death intestate. *In re Moehring*, 48 N. E. R. 818, 154 N. Y. 423; *Deegan v. Wade*, 39 N. E. R. 692, 144 N. Y. 573, 26 N. Y. Supp. 898, 75 Hun, 39. See *post*, § 798. In Alabama (by the Code, § 1852), an absolute power of disposal given to the owner of an estate, unaccompanied by any trust or a power to devise the inheritance, will give him the fee. *Hood v. Bramlett*, 105 Ala. 660, 17 S. R. 105. See also *Gifford v. Choate*, 100 Mass. 343, 346.

⁴ See § 358.

language directing that what remains of the property at the death of that devisee shall devolve upon a particular person, or class of persons, will not cut down the fee to a life estate. The fee, being vested by express and appropriate words, will not be diminished by subsequent words of a vague and general character which are absolutely repugnant¹ to the estate granted.² Thus, a gift absolutely to A. "with all the power and rights that the testator enjoyed," with a direction that he *should make a will leaving what remains* of the property at his death to certain persons named,³ or a direction that certain legacies are to be paid, *after the death of the devisee*, out of the proceeds of the land, which is devised absolutely;⁴ that certain property absolutely bequeathed should on the death of the devisee go to his children;⁵ or a gift to A. with *full power to alienate, convert or dispose of*, and upon his death as much of it as remains to his children,⁶ does not diminish the estate given in fee to a life estate.⁷

While it is true that a gift over of "what remains" unexpended, coming after a gift of the fee created in clear language, will not reduce the devise of the fee to a life estate, and will be rejected from the will, yet the testator is not prevented from making a valid gift of what remains after use by the

¹ *Ante*, § 361.

² *Browning v. Southworth* (Conn., 1898), 41 Atl. R. 768; *Trustees v. Harris*, 62 Conn. 93, 26 Atl. R. 456; *Halladay v. Strickler*, 48 N. W. R. 228, 78 Iowa (1889), 388; *Jones v. Bacon*, 68 Me. 34; *Stuart v. Walker*, 72 Me. 145; *Mitchell v. Reed*, 77 Me. 423, 425, 1 Atl. R. 141; *Taylor v. Brown*, 88 Me. 56, 57; *Foster v. Smith*, 31 N. E. R. 291, 156 Mass. (1892), 379; *Veeder v. Meader*, 157 Mass. 413, 32 N. E. R. 358; *Benz v. Fabian* (N. J. Eq., 1897), 35 Atl. R. 760; *In re Haskell's Estate*, 43 N. Y. Supp. 1144; *Myers v. Bentz*, 127 Pa. St. 222 (1889), 17 Atl. R. 899; *Boyle v. Boyle*, 25 Atl. R. 494, 152 Pa. St. 108, 31 W. N. C. 453; *Bibbens v. Potter*, L. R. 10 Ch. D. 733.

³ *Good v. Miller*, 22 Atl. R. 1032 (1891), 144 Pa. St. 287.

⁴ *Hovey v. Walbank*, 34 Pac. R. 650, 100 Cal. 192.

⁵ *Hall v. Palmer*, 87 Va. 354, 12 S. E. R. 618; *Judevine's Ex'rs v. Judevine*, 61 Vt. 587, 18 Atl. R. 778. A devise to the children of the testator, coming after a gift of land to his wife and her heirs, is void as a remainder because of the preceding fee; and as an executory devise, because it is repugnant to the unlimited power of disposal. *Wolfer v. Hemmer*, 144 Ill. 554, 33 N. E. R. 751.

⁶ *McClellan v. Larchar*, 16 Atl. R. 269, 45 N. J. Eq. 17.

⁷ A devise to A. and his heirs confers an absolute estate upon A.; and an executory devise over on his not disposing of the same by will is void. *Combs v. Combs*, 67 Md. 11, 8 Atl. R. 757; *Rea v. Bell*, 147 Pa. St. 118.

first taker.¹ If from the will it clearly appears that the testator intended that the first taker is to have a fee simple, with a full power of disposition, *in any and every event and for all purposes*, to the same extent as he would have himself, a devise over of "what remains" is invalid. If, however, the devise to the first taker is a life estate in express words, with a power of disposing of the fee for a *particular purpose* only, as for *the support and maintenance* of the life tenant, or for *the care and education of his children*, a devise over of "what remains" after his death is valid, though it is liable to be disappointed by the exercise of the power of sale by the life tenant, and the application of the proceeds to the purposes indicated. Here the power of sale for a particular purpose attached to a life estate does not of necessity enlarge it to a fee simple, and consequently there is no repugnancy in giving what remains to others in fee.²

§ 690. The effect of a devise over on death during minority in creating a fee.—Where an estate is given to a person in indeterminate language, with a gift over in the case of his death under the age of twenty-one years,³ and the fee is not expressly disposed of in the event of his attaining majority, the testator will be presumed to have intended to give him a fee simple in the event of his surviving to that age.⁴ So, also, is this the case where the devise is to a person, and if he shall die under age and without leaving issue living at his decease, then to another person in fee. Even where the devise over which is to take effect upon the death of a prior devisee is of an estate for life only, the same rule has been applied,⁵ by which on the attainment of majority a fee simple is vested, though obviously the application of the rule to such a limitation is not so apparent as in the case of a gift over of the fee.

¹ See *ante*, § 687.

² *Pellizzarro v. Reppert*, 83 Iowa, 497, 50 N. W. R. 19; *Howze v. Barber*, 29 S. C. 466, 7 S. E. R. 817; *Bradley v. Carnes*, 94 Tenn. 27, 27 S. W. R. 1007; *McMurray v. Stanley*, 69 Tex. 227, 6 S. W. R. 412. A devise to A. for life, trusting that she will give the residue to certain persons, gives her an absolute fee, and the devise

of the residue at her decease by the testator is void for repugnancy.

³ See cases *ante*, § 467.

⁴ *Doe v. Cundall*, 9 East, 400; *Marshall v. Hill*, 2 Maule & Sel. 608; *Burke v. Annis*, 11 Hare, 232; *Harrison's Estate*, L. R. 5 Ch. 408; *Malona v. Schwing* (Ky., 1897), 39 S. W. R. 523.

⁵ *Frogmorton v. Holyday*, 3 Burr. 1618, 1 Will. Bl. 535.

But the rule does not apply to a devise over of the fee to take place upon the happening of an event which is *in no wise connected with the prior devisee*.¹ On the other hand, where an estate is devised in express words conferring the fee, with a limitation over of an interest in indeterminate language to another person, upon the death of the first tenant without issue or under the age of twenty-one, the common-law rule applies to the estate over. The fact that the first devise is a fee simple, and that it is to be defeated upon a contingency, will not be a sufficient indication that the testator wished the devisee over, to whom a gift in vague language is given, to take the fee upon the happening of that contingent event.²

§ 691. Gifts for life of consumable articles.—A gift for life of articles which are perishable, or which are consumed if they are properly used, gives the absolute title to them to the life tenant, and no limitation over of the property given, or of what remains at the death of the life tenant, is valid.³ Thus, for example, where the testator makes a specific gift of the furniture⁴ in his house, the provisions or wine in his cellar, the hay and grain on his farm, or the like, for the life of a person, that person takes the absolute title. But if the bequest includes only wine or provisions,⁵ or fodder⁶ for cattle on a

¹ *Roe v. Blacket*, Cowp. 235; *Pol-lard's Estate*, 3 De Gex, Jo. & Smith, 54.

² *Doe v. Holmes*, 2 Wils. 80; *Harrison's Estate*, L. R. 5 Ch. 408.

³ *In re Cashman's Estate*, 28 Ill. App. (1888), 346; *Sheets v. Wetzel*, 39 Ill. App. 600; *Pritchard v. Walker*, 121 Ill. 221 (1887), 12 N. E. R. 336; *Wilson v. Turner* (Ill., 1897), 45 N. E. R. 820; *In re Burbank*, 69 Iowa (1886), 378, 381; *Barth v. Barth* (Ky.), 38 S. W. R. 511; *Whittemore v. Russell*, 80 Me. (1891), 297, 300, 14 Atl. R. 197; *Fuller v. Fuller*, 84 Me. (1892), 475, 482, 24 Atl. R. 946; *Collins v. Wickwire*, 162 Mass. 143, 144; *Rouns-dell v. Rouns-dell*, 21 Me. (1842), 288, 293; *Kelly v. Meigs*, 135 Mass. 231, 235; *Knight v. Knight*, 162 Mass. 460, 461, 88 N. E. R. 1131; *Marston v. Carter*, 12 N. H. (1841), 159; *In re Maack's Estate*, 13 Misc. R. 368, 35

N. Y. S. 109; *In re Williamson*, 9 N. Y. S. 470, 1 Con. Sur. 139; *Mark-ley's Sup.*, 132 Pa. St. 352, 25 W. N. C. 521, 19 Atl. R. 138 (farming uten-sils); *Robertson v. Hardy's Adm'r* (Va.), 23 S. E. R. 766; *Linger's Ap-peal*, 1 Atl. R. 722 (1885), 110 Pa. St. 398; *Messinger's Appeal*, 19 Atl. R. 485, 133 Pa. St. 495 (crops, live-stock, etc.); *In re Heck's Estate*, 107 Pa. St. 282 (1884), 32 Atl. R. 413; *Randall v. Russell*, 3 Mer. 195; *Andrew v. An-drew*, 1 Coll. 690, 691; *Twining v. Powell*, 2 Coll. 262.

⁴ Furniture and similar personal property given to a person for life should be delivered to him by the executor. *Fuller v. Fuller*, 84 Me. 475, 24 Atl. R. 946.

⁵ *Phillips v. Beal*, 32 Beav. 25.

⁶ *Cockayne v. Harrison*, L. R. 13 Eq. 432.

farm,¹ which is carried on for raising stock as a business, the rule does not apply, and the first taker has a life estate only. If, however, the testator has *expressly indicated that the life taker shall not be liable for property consumed*, he will be absolutely entitled even to a stock in trade, though it is given for his life only.²

§ 692. A bequest of the rents and profits of land carries the land.—A gift to A. of the *rents, issues and profits* of land, or its *net income*, if there is no disposition of the land itself, has always been regarded as a devise of the land, both at law and in equity. If the income of the land is given expressly for life, or for years, or to A. and his heirs, he or they take an estate in the land of precisely the same duration.³ At the com-

¹ Breton v. Mockett, L. R. 9 Ch. 95; Groves v. Wright, 2 Kay & J. 347.

² Breton v. Mockett, L. R. 9 Ch. 95. See Bryant v. Easterson, 5 Jurist (N. S.), 166. See also as to enjoyment in specie, *ante*, § 434.

"The expression 'for his use during his natural life,' employed in creating a life estate, is of considerable force in determining the question whether the life tenant possesses a power of alienating the fee. The use of real property during the life-time of the tenant does not of necessity consume it, if it is used with ordinary care. The reverse is the case with personal property, particularly that which is of a perishable nature, such as cattle, food, farming implements, furniture, etc. Hence when a testator shall bequeath the use of personal property to one for life, with a provision that whatever remains at the death of the life tenant shall go over, it is reasonable to suppose that, knowing the character of the property disposed of, he intended to permit the life tenant to consume for her use as much as she may desire during her life, and that only such property as was not worn out, lost, consumed or destroyed was to go to the remaindermen." Goudie v. Johns-

ton, 109 Ind. 427, 481; Giles v. Little, 104 U. S. 291; Green v. Hewitt, 97 Ill. 113.

³ Bristol v. Bristol, 53 Conn. 259 (1885); Lorton v. Woodward, 5 Del. Ch. 505; Turner v. Kilpatrick, 77 Ga. 749 (1886), 3 S. E. R. 246; Ryan v. Allen, 120 Ill. 648 (1887), 12 N. E. R. 65; Thompson v. Murphy, 10 Ind. App. 464; Peale v. White, 7 La. Ann. (1852), 449; Andrews v. Boyd, 5 Me. 199; Earl v. Rowe, 35 Me. 414, 419; Stone v. North, 41 Me. 265, 271; Butterfield v. Haskins, 33 Me. 392, 393; Fuller v. Fuller, 84 Me. 475, 479, 24 Atl. R. 946; Hopkins v. Keazer, 89 Me. 347, 354; Paine v. Forsaith, 86 Me. 357, 361, 30 Atl. R. 11; Dascomb v. Martin, 80 Me. 223, 231, 13 Atl. R. 888; Reed v. Reed, 9 Mass. (1812), 372; Johnson v. S. D. Company, 79 Md. 18, 28 Atl. R. 890; Palms v. Palms, 68 Mich. 355; Mandlebaum v. McDonell, 29 Mich. 78, 84; Craft v. Snook, 13 N. J. Eq. 121; Diamant v. Lare, 31 N. J. L. (1866), 200; Bishop v. McClelland, 44 N. J. L. 450, 16 Atl. R. 1; Harston v. Elder, 50 N. J. Eq. 522, 525, 26 Atl. R. 561; Gullick v. Gullick, 25 N. J. Eq. 324; Passman v. Company (N. J. Eq.), 41 Atl. R. 953; Lippincott v. Pancoast, 47 N. J. Eq. 26, 26 Atl. R. 360; Patterson v. Ellis, 11 Wend. (N. Y., 1833), 260; Smith v.

mon law a devise of the rents, issues and profits of land, in indeterminate language without words of inheritance, gave a life estate only in the land.¹ But now by statute such a gift carries the testator's whole interest, even in the absence of words of inheritance.² So generally it is the rule that by an indefinite bequest of the income of the fund of personal property an absolute title to the personal property passes to the devisee.³

But the rule that a gift of the interest of the fund or of the income of the land is a gift of the fund or of the land itself is *only applicable if the testator has not expressly or by implication disposed of the corpus in some other way*. The presumption that he intended the legatee of the income to take the *corpus*,⁴ by giving him the interest, is not conclusive, and may be rebutted by evidence appearing on the will. Thus, if the testator, after giving the income or issues and profits of land to one for life, provides that, on his death, it shall go to others; or if, giving the income in fee, he devises it over on the contingency of the death of the devisee without issue, the presumption is overcome.⁵ A devise of ground rent by the testator, who owns the reversion out of which the ground rent issues, it has anciently

Post, 2 Edw. Ch. (N. Y.) 583; Hatch v. Bassett, 52 N. Y. 359, 361; In re Hoyt's Will, 11 N. Y. S. 901; Earl v. Grim, 1 Johns. Ch. (N. Y.) 494, 498; Craig v. Craig, 3 Barb. Ch. (N. Y., 1848), 76; Thornton v. Stanley (Ohio, 1898), 45 N. E. R. 318; Sproul's Appeal, 105 Pa. St. 441; Silknitter's Appeal, 45 Pa. St. 365; Drusadow v. Wilde, 63 Pa. St. 170; France's Estate, 75 Pa. St. (1874), 220, 224; Bradford v. Bradford, 6 Whart. (Pa.) 241, 244; Willard's Appeal, 87 Pa. St. 457; Appeal of Pennsylvania Co., 83 Pa. St. 312; Bowen v. Payton, 14 R. L. 257; Rhodes v. Rhodes, 98 Tenn. 637, 13 S. W. R. 590; Day v. Williams, 1 Pickle, 646, 4 S. W. R. 8; Paramour v. Yardley, Plow. 540; 4 Kent Com. 536; Co. Litt. 4b; Parker v. Plummer, Cro. El. 190; South v. Alleine, 1 Salk. 228.

¹ Hodson v. Ball, 14 Sim. 571.

² Plenty v. West, 6 Com. Bench, 201;

Mannox v. Greener, L. R. 14 Eq. 456; and see cases cited in note 3, p. 949.

³ Craft v. Snook, 13 N. J. Eq. 121; Mason v. Trustees, 27 N. J. Eq. 47; Earl v. Grim, 1 Johns. Ch. (N. Y.) 494, 495; Thornton v. Stanley (Ohio, 1898), 45 N. E. R. 318; Garret v. Rex, 6 Watts (Pa.), 14; Van Rensselaer v. Dunkin, 24 Pa. St. 252; Humphrey v. Humphrey, 1 Sim. (N. S.) 536; Watkins v. Weston, 32 Beav. 238, 3 De Gex, J. & S. 433.

⁴ Which is based on feudal reasons. 2 D., M. & G. 781.

⁵ Dorr v. Wainwright, 13 Pick. (30 Mass., 1833), 328, 329; Read v. Head, 6 Allen (88 Mass., 1863), 395; Saunderson v. Stearns, 6 Mass. 37 (1816); Parker v. Moore, 25 N. J. Eq. 228; Giddings v. Seward, 16 N. Y. 365; Parker's Appeal, 61 Pa. St. (1869), 478; Bently v. Kauffman, 80 Pa. St. 99.

been held, carries the reversion.¹ A gift of the free use or the use and occupation of land will carry the interest in the land. The devisee has then the legal right to lease it, or to sell it, and is not usually limited to the personal use and occupation of it.²

§ 693. **Statutory changes in England of the rule which required words of inheritance to pass the fee.**—The fact is indisputable that in most cases the intention of the testator was nullified by the rule of the common law that a devise of lands, tenements and hereditaments, without words of inheritance, conferred an estate for life only. As a consequence of the hardship of the rule it was ultimately abolished in England by statute 1 Vict., ch. 26. The intention of the testator, where he gives an interest in property in indeterminate language, is to give all that he owns himself; and to construe such words as creating only a life estate, where he owns the fee, is directly contrary to his intention. Hence it was enacted by section 28 that where “real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will, unless a contrary intention shall appear from the will itself.” The determination whether the will carries the fee where there are no words of limitation is not wholly set at rest by this or the similar statutes existing in the United States, for the effect of the statute is merely to raise a presumption of an intention contrary to that which existed prior to their passage. The old presumption was that the testator, by words of conveyance without words of limitation, intended to give only a life estate, which presumption was rebuttable by showing that he intended to give the fee, or all he owned.

The presumption is now the other way. He is presumed to intend to give the fee, unless a contrary intention appears in his will. The person who claims that the testator intended to give only a life estate is under the necessity of showing that

¹ *Kerry v. Derrick*, Moore, 771, Cro. Jac. 104; *Maundy v. Maundy*, 2 Stra. 1020; *Cas. temp. Hardwicke*, 142; *Kay v. Laxon*, 1 Bro. C. C. 76.

² *Cooke v. Gerrard*, 1 Saund. 181, 186; *Rabbeth v. Squire*, 19 Beav. 70, 1020; 4 De Gex & J. 406; *Mannox v. Greener*, L. R. 14 Eq. 456.

he did so intend, and if he cannot do this, the devise will carry all the interest of the testator. The courts are not inclined to favor the restricted construction by which a life estate is created, and there would have to be a very plain indication of an intention to that effect.

The mere fact that the testator, in another part of the will, creates a fee by proper language,¹ is not enough alone to show that he intends to create a life estate by indefinite language.

§ 694. Statutory regulations in the United States.—In very many states of the American Union statutes similar in their character to the English statute above mentioned have been enacted. The general phraseology of these statutes is that in all devises where the word “heirs,” or other words of inheritance, are omitted, the whole estate of the testator in the premises devised shall pass, unless it clearly shall appear in the will itself, by limitation over or otherwise, that the testator intended to devise a less estate than a fee. This is the rule in Alabama,² Illinois,³ Georgia,⁴ Indiana,⁵ Iowa,⁶ Maryland,⁷ Massachusetts,⁸ Minnesota,⁹ Michigan,¹⁰ Missouri,¹¹ Mississippi,¹² Ne-

¹ Wisden v. Wisden, 2 Sm. & Gif. 896.

² Code, § 2178.

³ Coth. Ann. Stat. 310, § 13; McConnell v. Smith, 23 Ill. 611; Giles v. Anslow, 21 N. E. R. 225, 128 Ill. 187.

⁴ Code, §§ 2248, 2249.

⁵ R. S. 1876, p. 864, § 14; Smith v. Meiser, 51 Ind. 419; Mills v. Franklin, 128 Ind. 444; McMahan v. Newcomer, 82 Ind. 565, 568; Mulvane v. Rude, 45 N. E. R. 659, 146 Ind. 476. Thus, a devise to a wife of “all my property, personal and real, after paying my debts,” gives the fee. Ross v. Ross, 135 Ind. 367, 35 N. E. R. 9.

⁶ Code, art. 93, §§ 305, 314.

⁷ Newton v. Griffith, 1 Harr. & G. 111, 138. By a devise that “I give and bequeath to my son . . . all my property, . . . and, in case he should die without heir, then” to testator’s brothers and sisters, the son took an estate in fee simple. Benson v. Linthicum, 75 Md. 141, 23

Atl. R. 133; Pennington v. Pennington, 17 Atl. R. 329, 70 Md. 418.

⁸ Pub. St., ch. 127, § 24.

⁹ Stat. at Large, ch. 35, § 2.

¹⁰ How. Stat., § 5786. Where the first clause of a will devises an estate in fee, without words of limitation, and the other clauses burden the estate so devised with a trust in favor of testator’s children, the devisee does not take a life estate, but the fee, subject to the trust imposed on the estate devised; How. St., § 5786, providing that any devise shall be construed to convey all the estate unless it shall clearly appear that there was an intention to convey a less estate. Forbes v. Darling, 54 N. W. R. 885, 94 Mich. 621; Speirs v. Roberts, 73 Mich. 666, 41 N. W. R. 841.

¹¹ R. S. 4004; Cook v. Couch, 13 S. W. R. 80, 100 Mo. 29.

¹² Code, § 2285.

braska,¹ New Hampshire,² New Jersey,³ New York,⁴ North Carolina,⁵ Pennsylvania,⁶ Rhode Island,⁷ South Carolina,⁸ Tennessee,⁹ Texas,¹⁰ Vermont,¹¹ Virginia¹² and Wisconsin.¹³ Hence, it follows where these statutes are in force that the word "heirs" or similar words of limitation or inheritance are not necessary to convey an absolute title to the lands when devised in a will.¹⁴

¹ At common law a devise of real estate, in order to convey the fee, must contain words of inheritance or perpetuity; but under the Nebraska statutes such words are not necessary, and every devise of land is to be construed to convey all of the estate of the deviser therein, unless it shall clearly appear by the will that the deviser intended to convey a less estate. *Little v. Giles*, 41 N. W. R. 186, 25 Neb. 313.

² *Burke v. Stiles*, 65 N. H. 163, 18 Atl. R. 657; *Cressy v. Wallace*, 66 N. H. 566, 29 Atl. R. 842.

³ Vol. 2, Rev. (1877), p. 300, § 18.

⁴ 1 R. S., art. 748, § 1.

⁵ R. S., ch. 119, § 45.

⁶ Act Pa. April 8, 1833, § 9, *Purdon's D.*, p. 1475; *Lloyd v. Mitchell*, 130 Pa. St. 205. Thus, a devise "share and share alike" simply (*White v. Commonwealth*, 1 Atl. R. 33, 110 Pa. St. 90); or of one-half the land I possess (*McIntyre v. McIntyre*, 128 Pa. St. 323, 23 W. N. C. 41, 16 Atl. R. 783); or she shall have all the personal property for her own (*Snider v. Baer*, 22 Atl. R. 897, 144 Pa. St. 278, 26 W. N. C. 460); or the lands shall be divided in equal parts (*Coles v. Ayres*, 27 Atl. R. 375, 156 Pa. St. 197); or similar language (*Schuldt v. Herbine*, 3 Pa. Super. Ct. 65, 39 W. N. C. 290). A devise to testator's wife, "in lieu of dower," of "my present residence, with the lands and improvements," passes to the wife a fee simple, where there is no devise over or words of limitation, and the will makes other bequests to the wife and to testator's children, and provides that, should the wife desire to quit the residence, and sell the same

"in fee simple," and invest the proceeds, she should have power to do so (*Dilworth v. Gusky*, 18 Atl. R. 899, 131 Pa. St. 348; *Anders v. Gerhard*, 21 Atl. R. 253, 140 Pa. St. 153), carries the fee.

⁷ Gen. St., ch. 171, § 5; *Pierce v. Simmons* (R. I.), 19 Atl. R. 242.

⁸ R. S., ch. 86, § 9; *Hall v. Goodwin*, 4 McCord (S. C.), 442.

⁹ R. S., § 2006; *Davis v. Williams*, 1 Pickle, 646, 4 S. W. R. 8.

¹⁰ R. S., art. 551; *May v. San Antonio & A. P. Town-Site Co.*, 83 Tex. 502, 18 S. W. R. 959.

¹¹ Gen. Stat., ch. 49, § 3.

¹² Code, ch. 112, § 8. The fact that the testator, at the close of the will, says: "Having disposed of what I have," and in another part speaks of a devise to his son as "his portion of my estate," does not manifest such intention to devise his whole estate as to warrant construing the above clause to convey a fee to M. Sutherland's Ex'rs v. Snyder, 84 Va. 880, 6 S. E. R. 480.

¹³ R. S., ch. 97, § 2; *Cheney v. Plumb*, 79 Wis. 602, 606.

¹⁴ *Smith v. Greer*, 6 S. R. 911, 88 Ala. 414, *Saulsbury*. Ch., dissenting; *Shimer v. Mann*, 99 Ind. 190, 192; *Hochstedler v. Hochstedler*, 108 Ind. 506, 509; *Allen v. Craft*, 109 Ind. 476, 479; *Reddick v. Lord*, 131 Ind. 336, 30 N. E. R. 1085; *New Eng. Mort. Co. v. Buice* (Ga., 1897), 26 S. E. R. 84; *Mulvane v. Rude*, 146 Ind. 476, 45 N. E. R. 659; *Wilkinson v. Chambers*, 181 Pa. St. 437, 442, 37 Atl. R. 569; *Davis v. Williams*, 1 Pickle (Tenn.), 646, 4 S. W. R. 8; *McGee v. Hall*, 1 S. E. R. 711, 26 S. C. 79; *Cheney v. Plumb*, 79 Wis. 602, 606.

CHAPTER XXXVI.

THE DOCTRINE OF EQUITABLE CONVERSION IN RELATION TO WILLS.

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| <p>§ 695. The definition and origin of equitable conversion.</p> <p>696. The intention of the testator to effect a conversion.</p> <p>697. A power of sale in will alone does not convert — The direction to sell must be imperative.</p> <p>698. Direction to sell land for the purpose of paying debts — When it converts.</p> <p>699. Conversion without the creation of an express trust to sell.</p> <p>700. A discretion as to the time and the place of sale does not prevent a constructive conversion.</p> <p>701. Conversion where no express power of sale is conferred.</p> <p>702. The date at which a constructive conversion takes place.</p> <p>703. The sale of land after the death of the tenant for life.</p> <p>704. Blending proceeds of land with personal property — The effects of.</p> <p>705. Conversion depending upon a contingency, or upon the consent or request of a legatee.</p> <p>706. A direction to sell at a fixed price.</p> <p>707. The effect of an option to purchase given to a beneficiary.</p> <p>708. Conversion in the case of land contracted to be sold by the testator.</p> <p>709. Conversion in the case of land contracted to be bought by the testator.</p> | <p>§ 710. Lands devised subject to an option to purchase.</p> <p>711. Conversion in the case of land taken for public use.</p> <p>712. Conversion by an order of court of land belonging to an infant or a lunatic.</p> <p>713. The effects of a constructive conversion.</p> <p>714. Dower and curtesy in property converted.</p> <p>715. The failure of the purpose of a conversion — Reconversion.</p> <p>716. Resulting trust for the benefit of the next of kin.</p> <p>716a. The nature of the property in which a reconversion is had for the benefit of the heir.</p> <p>717. Conflict of laws in relation to equitable conversion.</p> <p>718. Double conversion defined.</p> <p>719. Election to take the property unconverted.</p> <p>720. Who may elect to take the property unconverted.</p> <p>721. All persons at interest must concur in electing.</p> <p>722. When an election must be made.</p> <p>723. What acts constitute an election to take property unconverted.</p> <p>724. Election by remaindermen to take property unconverted.</p> <p>725. When the tenant in tail may elect.</p> <p>725a. No constructive conversion when money is at home.</p> |
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§ 695. The definition and origin of the doctrine of equitable conversion.—Conversion has been defined by the authorities as that change in the nature of property by which, for certain purposes, real property is regarded in equity as personal property, and personal as real, and each is transmissible and descendible as the property into which it is constructively converted.¹ The doctrines of the constructive conversion and constructive reconversion of property are exclusively of equitable origin. The English chancellors, by reason of their jurisdiction of trusts, were very early called upon to adjudicate cases in which a testator in disposing of property, or a parent in making or in agreeing to make a marriage settlement for his child and her family, had directed that land which was devised, or which was comprised in the settlement, should be sold, and he had furthermore directed the proceeds to be devoted to a particular purpose; or a testator or a settlor had directed that money should be invested in lands for the benefit of a beneficiary under the will or the settlement, and in which, either because of the wilful refusal of the trustee to act, or because of his delay and negligence in carrying out these directions, the alteration in the nature of the property had not been effected, in consequence of which the intention of the deviser or of the settlor was in imminent danger of being defeated. It was admitted that the owner of the property might change its nature. He might make land money, and money land; and what he might do himself *he could do through another*. Nor would a court of equity permit the negligence or the delay of the trustee to prejudice the rights of the parties to be benefited, who had under these circumstances no remedy at law. The neglect of the trustee would often work a serious injustice to the beneficiary. Thus, if the testator devised lands in trust, with a direction that they should be *at once sold* and the proceeds paid to A., and the sale was unreasonably postponed until after A. had died, his or her next of kin, who would have received the money if the directions of the testator had been promptly complied with, would be deprived of it, and the trustee could then at law convey the legal title to the heir of A. who may have been a different person from the next of

¹ Howard v. Peavey, 128 Ill. 430, 435.

kin, and A.'s widow could also claim dower in the land unsold. In order, therefore, to prevent this manifest injustice to the *cestui que trust* who had no remedy at law, and to carry out the intention of the testator or settlor, courts of equity applied to such a case the well recognized equitable maxim that equity considers that to have been done which ought to have been done. Upon this important maxim is based the whole doctrine of equitable conversion.¹

In other words, as was remarked by Sir Thomas Sewell² in the year 1777, it was a principle well established at that time, that money which was directed to be employed in the purchase of land, and land which was directed to be sold and turned into money, will be considered as that species of property into which they are respectively directed to be converted.³

¹ Sweetapple v. Bindon, 2 Vern. 536; Durour v. Motteux, 1 Ves. 320, 1 Sim. & St. 292, n.; Fletcher v. Ashburner, 1 Bro. C. C. 497, 499; 1 White & Tudor's L. C., pt. II, 968 et seq.; Rankin v. Rankin, 36 Ill. (1864), 293; Howard v. Peavey, 128 Ill. 430, 435; Roy v. Monroe, 47 N. J. Eq. 356; Hawley v. James, 5 Paige (N. Y.), 318, 444; Moncrief v. Ross, 50 N. Y. (1872), 431; Burr v. Sim, 1 Whart. (Pa., 1835), 252, 262; Ford v. Ford, 70 Wis. 19, 47.

² In Fletcher v. Ashburner, 1 Bro. C. C. 497, 499.

³ See also Wheldale v. Partridge, 5 Ves. 388, 396, 8 Ves. 226, 236. "The forbearance of the trustees in not doing what was their duty and office to have done shall in no sort prejudice the *cestui que trust*, since at that rate it would be in the power of trustees, either by doing or delaying to do their duty, to affect the rights of other persons, which can never be maintained. Wherefore the rule in all such cases is, that what ought to have been done shall be taken as done; and a rule so powerful it is as to alter the very nature of things, to make money land, and, on the contrary, to turn land into money." By Sir J. Jekell, M. R., in Lechmere v.

Earl of Carlisle, 3 P. Wms. 211, 215. The doctrine of equitable conversion, though for the first time thoroughly considered in Fletcher v. Ashburner, 1 Bro. C. C. 497, had already been formulated in equity prior to that decision. In that case the testator, blending his real and personal estates in one fund, directed a sale, and that the trustees should hold the proceeds for the life or widowhood of his wife, and on *her* death pay over the fund to his daughter and son, share and share alike, when either attained the age of twenty-one. The daughter attained majority and died unmarried before her brother and mother. The son was of age at the death of the testator, but died without issue in the life of his mother. The question arose between the personal representative of the widow, who was the sole next of kin of the son, and who claimed the fund as personal property, and the heir at law of the son. The chancellor determined that as the son had the whole beneficial interest vested in him by his surviving his sister, but subject to his mother's life interest, it went to her as money, as his sole next of kin.

§ 696. **The intention of the testator to effect a conversion.**—A constructive conversion of land into money, or *vice versa*, will not be effected by the will unless such is plainly the intention of the testator. Whether conversion shall take place depends, not upon any particular language used in the will, but upon his intention as it is gathered from the provisions of the whole will. The *prima facie* presumption always is that all property which is disposed of by the will is to retain its original character indefinitely, and the intention to effect a constructive conversion must be clearly and unequivocally shown. The intention to convert must be ascertained exclusively from the language of the will. Parol evidence is not admissible to prove the existence of this intention, except so far as parol evidence may be received to show the circumstances of the testator and the condition of his estate at the time of his death.¹

§ 697. **A power of sale alone does not convert — The direction to sell must be imperative.**—In order that land devised shall be regarded as constructively converted in equity, it is absolutely necessary that a sale shall be directed by the testator, either expressly or by necessary implication. If a sale is directed, the direction to sell must be out and out, in absolute and positive terms. The direction to sell, in order to effect a conversion, must be mandatory and imperative. The power of sale must be directed to be exercised irrespective of any and all contingencies. A mere authority to sell at the discretion

¹The doctrine of equitable conversion is thus stated in the leading case of *Fletcher v. Ashburner*, 1 Bro. C. C. 497, 499, and approved in *Wheldale v. Partridge*, 5 Ves. 388, 396: "Money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given—whether by will, by way of contract, marriage articles, settlements, or otherwise; and whether the money be actually deposited or only covenanted to be

paid; whether the land is actually conveyed. The owner of the fund or the contracting parties may make land money, or money land. The foundation of this doctrine is the well-known equitable principle which considers that as done which ought to have been done. The testator may, by directing the conversion of land into money, or money into land, so alter and change the character of his property that, though no actual alteration in its character has taken place, those to whom he has distributed it by his will take it in its new character."

of the trustee, without any provision absolutely necessitating a sale, will not work a conversion. The language of an express direction to sell is not material; the language need not be expressly mandatory, if from the whole will the direction to sell is mandatory. The intention to require a sale is most commonly manifested by an express direction in the will that land shall be sold; but the request of the testator, or his wish or desire, that the land devised shall be sold, is also clearly mandatory and imperative, if from the context it is apparent that a sale is necessary to carry out his intention.¹

¹ *Nevitt v. Woodburn* (Ill., 1898), 51 N. E. R. 593; *Hocker v. Gentry*, 3 Metc. (60 Ky.) 463; *Christler v. Meddis*, 6 B. Mon. (45 Ky.) 35, 37; *Collins v. Champ*, 15 B. Mon. (Ky.) 118; *Haggard v. Rout* (1845), 6 B. Mon. (Ky.) 247, 249; *Green v. Johnson*, 4 Bush (67 Ky.), 164, 167, *Whittemore v. Russell*, 80 Me. 297; *Hewitt v. Fisher*, 1 Har. & G. (Md., 1827), 83, 96; *Ledenham v. Nicholson*, 1 Har. & G. (Md.) 267; *Thomas v. Wood*, 1 Md. Ch. 296, 299; *Orrick v. Boehm*, 49 Md. 72; *Gates v. Hunter*, 13 Mo. (1850), 511; *Cook v. Cook*, 20 N. J. Eq. (1869), 375, 376; *Oberle v. Lerch*, 18 N. J. Eq. 346, 575; *Wurts v. Page*, 19 N. J. Eq. 365, 375; *Forsyth v. Forsyth*, 46 N. J. Eq. 400, 19 Atl. R. 119; *Smith v. Bayright*, 34 N. J. Eq. 424; *Brink v. Layton*, 2 Redf. 79, 85; *Bunce v. Vandergrift*, 8 Paige (1839), 37, 41; *In re Vandervoort*, 1 Redf. (N. Y.) 270, 275; *Marsh v. Wheeler*, 2 Edw. Ch. (1833), 156, 159; *Slocum v. Slocum*, 4 Edw. Ch. (1844), 613, 617; *White v. Howard*, 46 N. Y. 144, 162 (1871); *Lorillard v. Coster*, 5 Paige (N. Y.), 172, 218; *Sharpsteen v. Tillou*, 3 Cow. (N. Y.) 651; *Greenland v. Waddell*, 22 N. E. R. 367, 116 N. Y. 234; *In re Hardenbrook*, 52 N. Y. S. 845, 23 Misc. R. 538; *Baker v. Baker*, 45 N. Y. S. 870, 18 Appeal D. 189; *Mutual Life Ins. Co. v. Bailey*, 45 N. Y. S. 1069; *McBee, Ex parte*, 68 N. C. 332; *Croom v. Herring*, 4 Hawks' Eq. (11 N. C., 1825), 393; *Ferguson v. Stewart*, 14 Ohio (1846), 140; *Collier v. Collier*, 8 Ohio St. (1854), 369, 374; *Richey v. Johnson*, 30 Ohio St. 288 ("I devise my executors shall sell"); *Anewalt's Appeal*, 42 Pa. St. (1862), 414, 416; *Jones v. Caldwell*, 97 id. 45; *Hammond v. Putnam*, 110 Mass. 235; *Bleight v. Bank*, 10 Pa. St. (1849), 131; *Perot's Appeal*, 102 Pa. St. 235; *Roland v. Miller*, 100 Pa. St. 47; *Phelps v. Pond*, 23 Pa. St. 69; *Peterson's Appeal*, 88 Pa. St. 397, 1 Am. Prob. R. 187, 192; *Henry v. McCloskey*, 9 Watts (Pa.), 145; *Commonwealth v. Gordon* (Pa., 1887), 7 Atl. R. 229; *Rhode Island Trust Co. v. Harris*, 89 Atl. R. 750; *In re Holder* (R. I., 1898), 41 Atl. R. 576; *Postell v. Postell*, 1 Des. 173 (S. C., 1790); *Bell v. Bell*, 25 S. C. 149; *Effinger v. Hall*, 81 Va. 107; *Harcum v. Hudnall*, 14 Gratt. (Va., 1858), 369, 374; *Gould v. Taylor Orphan Asylum*, 50 N. W. R. 422 (1879), 46 Wis. 106; *Dodge v. Williams*, 46 Wis. 70; *Scott v. West*, 63 Wis. 529 (1885), 24 N. W. R. 61, 25 N. W. R. 18; *Bell v. Humphrey*, 8 W. Va. (1875), 1, 19; *Tazewell v. Smith*, 1 Rand. (Va.) 313; *Craig v. Leslie*, 3 Wheat. (U. S.) 563. "I allow my land to be sold" (*Ramsey v. Hannon*, 33 Fed. R. 425), "I wish my land to be sold" (*Brothers v. Cartwright*, 2 Jones' Eq. (N. C.) 113, 116), "the executors to dispose of my land" (*Rankin v. Rankin*, 36 Ill. 293, 299), are all mandatory expressions. A declara-

The existence of a power of sale in a trustee or in the executor does not alone work a conversion, where upon the whole will the exercise of the power is not by the will mandatory and imperative. A discretion as to the time or the mode of executing a power of sale will not prevent a conversion; but where the trustee having a power of sale has a full discretion whether or not a sale shall take place, which he may or may not exercise, according to his best judgment,¹ the land will not be equitably converted.²

tion by the testator that his real property shall be considered money is not usually sufficient, unless it is coupled with an intention to sell, *Attorney-General v. Mangles*, 5 Mees. & Wel. 120; *Johnson v. Arnold*, 1 Ves. 169. And see also cases cited in note 2, page 959.

¹ A frequent illustration of the rule of the text may be found where a power of sale of the land is conferred upon the executor to pay debts or legacies. The personal property of the testator is invariably the primary fund for the payment of debts and legacies, in the absence of a contrary intention clearly expressed. And it will be presumed that the power of sale was given to the executor only to facilitate the settlement of the estate in case the personal property should not prove sufficient to pay debts and legacies. If there is sufficient personal property to pay debts and legacies without selling the real property, there is no constructive conversion of the latter where the power of sale is not imperative in its terms.

² *Allen v. Watts*, 98 Ala. 384; *James v. Throckmorton*, 57 Cal. (1881), 368, 382; *Clay v. Hart*, 7 Dana (Ky.), 11, 17; *McCulloh v. Dashiell*, 1 Har. & G. (Md.) 96; *Smithers v. Hooper*, 23 Md. 273; *Howard v. Peavey*, 128 Ill. 430, 21 N. E. R. 503; *Holland v. Cruft*, 3 Gray, 162, 180; *Brearly v. Brearly*, 9 N. J. Eq. 21, 31; *Romaine v. Hendrickson*, 24 N. J. Eq. (1873), 231; *Konvalinka v. Geibel*, 40 N. J. Eq. 443;

Parker v. Glover, 42 N. J. Eq. 559, 9 Atl. R. 217; *Ness v. Davidson*, 49 Minn. 469 (1892), 52 N. W. R. 46; *Eneberg v. Carter*, 98 Mo. 273, 12 S. W. R. 522; *Fowler v. Depau*, 26 Barb. (N. Y.) 224, 239; *Phelps v. Phelps*, 28 Barb. (N. Y., 1857), 121, 139; *Matter of Vandervoort*, 1 Redf. 270, 275; *Hayes v. Kerr*, 45 N. Y. S. 1050; *Sayles v. Best*, 20 id. 951, 66 Hun, 628; *Harris v. Clark*, 7 N. Y. (1852), 242, 261; *Phelps' Ex'r v. Pond*, 23 N. Y. (1861), 69, 77; *Moncrief v. Ross*, 50 N. Y. 431, 436; *McCarty v. Deming*, 4 Lans. (N. Y., 1871), 440, 442; *Parker v. Linden*, 20 N. E. R. 858, 861, 113 N. Y. 28; *White v. Howard*, 46 N. Y. 144, 163; *Chamberlain v. Taylor*, 105 N. Y. 185; *Delafield v. Barlow*, 107 N. Y. 535, 14 N. E. R. 498; *Asche v. Asche*, 113 N. Y. 232, 21 N. E. R. 70; *In re Bingham*, 127 N. Y. 296, 27 N. E. R. 1055; *Wright v. Trustees*, 1 Hoff. Ch. 202, 219; *Newell v. Nichols*, 12 Hun, 604; *Mellen v. Banning*, 72 Hun, 176; *Scholle v. Scholle*, 21 N. E. R. 84, 113 N. Y. 261; *Clift v. Moses*, 22 N. E. R. 393, 116 N. Y. 144; *Penfield v. Tower*, 1 N. D. 216, 46 N. W. R. 413; *Graham v. Little*, 5 Ired. Eq. (N. C.) 407; *Powell v. Powell*, 6 Ired. Eq. 50; *Newby v. Skinner*, 1 Dev. & Bat. Eq. (N. C., 1837), 488, 491; *Mills v. Harris*, 10 S. E. R. 704, 104 N. C. 626; *Henry v. McCloskey*, 9 Watts (Pa.), 145; *Bleight v. Manufacturers' Bank*, 10 Pa. St. 131, 132; *Nagle's Appeal*, 13 Pa. St. 260; *Stoner v. Zimmerman*, 21 Pa. St. 394; *Edwards' Appeal*, 47 Pa. St. 144, 153;

If the conversion of the property is relegated to the judgment or the discretion of the trustee, or to that of any other person, no constructive conversion will take place, for the reason that the actual intention of the testator is not ascertainable. Conversion is only decreed where an intention to convert is clearly proved to have existed in the mind of the testator. If he leaves it wholly to the discretion of his trustee to convert or not, it is very apparent that he had no fixed intention in his mind to convert the property. If he had desired to do that, he would have given mandatory directions for that purpose. Thus, for example, we will suppose that the testator shall direct his executor to invest a sum of money *in good personal securities*, or to purchase *with it a piece of land, as he may see fit and proper*, for the benefit of A., who dies while the property is still personalty in the hands of the executor. As the testator appears to have been indifferent whether the executor shall purchase land or not, no reason exists after the death of the person for whose benefit the executor was to act, and who alone had the right to elect to take the property unconverted, to decree a constructive conversion. Where the power to convert is wholly discretionary, the representatives of the absolute owner take the property as it is found at his death. If the trustee has delayed conversion of the money into land, as he has the power to do, it goes to the next of kin. If the money has been converted by the exercise of the trustee's discretion, it is land, and descends as such to the heir, subject to the dower of the widow of the absolute owner.

§ 698. Direction to sell land for the purpose of paying debts — When it converts.— A mere authority in the executor to sell land for the purpose of paying the debts of the testator, without an explicit and mandatory direction to sell it, does not work a constructive conversion. In such a case, if there is suffi-

Neely v. Grantham, 58 Pa. St. 433, 136 Pa. St. 14, 19 Atl. R. 1068, 26 W. 437; Anewalt's Appeal, 42 Pa. St. N. C. 254; Greenough v. Small, 20 Atl. 414; Chew v. Nicklin, 45 Pa. St. 84, R. 896, 137 Pa. St. 128; Sill v. Blaney, 87; Brolasky v. Gally, 51 Pa. St. 509, 28 Atl. R. 251, 159 Pa. St. 264, 83 W. 513; Miller's Appeal, 60 Pa. St. 404; N. C. 536; In re Ingersoll's Estate, 31 McClure's Appeal, 72 Pa. St. 414; Atl. R. 860, 167 Pa. St. 536, 36 W. N. C. 251; Goodier v. Edmunds (1893), 3 Paige's Estate, 75 Pa. St. 87, 95; Peterson's Appeal, 88 Pa. St. 397, 1 Am. Ch. 455; Salliday's Estate, 175 Pa. St. Prob. R. 187; Sheridan v. Sheridan, 114, 34 Atl. R. 548.

cient personal property that must be first used in paying the debts,¹ while, if the personal property prove insufficient, only so much land shall be sold as is necessary to meet the deficiency.² The land in any event retains its character as real property, where the direction to sell for the payment of debts is not imperative, until actual sale, and if more is sold than is necessary to pay the debts the surplus will be constructively reconverted, and it will pass to the heir³ or to the devisee of the land. So where land which was devised to A. for life, then to be sold and the proceeds distributed, had to be sold *at once* to pay the debts of the testator, the money not used to pay debts should be held and the interest paid to the life tenant of the land. Only on his death may it be distributed.⁴

§ 699. Conversion without the creation of an express trust to sell.—In the majority of cases an equitable conversion is the result of an imperative direction to sell, couched in express terms. But it is not always necessary that an express direction to sell land shall be inserted by the testator, nor even that he shall give his executors or trustees an express power of sale.⁵ Where the intention and the purposes of the testator, as they are manifested by the provisions of the whole will, clearly require a conversion in order that they may be carried out, a constructive conversion will be decreed in equity, though no express authority or direction to sell is contained in the will.⁶ Thus, where a testator, after stating that he did not know how much property he owned, as it was widely scattered and unrealized, divided his estate into shares and then directed his executor *to get his estate together*, it was held that a conversion took place, though no express power of sale was given to the executor.⁷ So also a direction contained in a will to invest a sum therein

¹ *Ante*, § 374.

² Compare *ante*, § 379.

³ *Jackson v. Jackson*, 6 Johns. 73; *Perkins v. Coughlan*, 148 Mass. 301, 18 N. E. R. 600; *Sharpsteen v. Tillou*, 3 Cow. (N. Y.) 651; *Hawley v. James*, 7 Paige, 213 (N. Y., 1838); *White v. Howard*, 46 N. Y. (1871), 144; *Clift v. Moses*, 22 N. E. R. 393, 116 N. Y. 144, 154; *McCarty v. Terry*, 7 Lans. (N. Y.) 231, 238; *North v. Valk*, Dud. Eq.

(S. C., 1837), 212, 217; *Cruse v. Barley*, 3 P. W. 22.

⁴ *In re Hubert's Estate*, 181 Pa. St. 551, 37 Atl. R. 576.

⁵ *Post*, § 701.

⁶ *Phelps v. Phelps*, 28 Barb. (N. Y., 1858), 121, 139; *Clarke v. Clarke*, 46 S. C. 230, 24 S. E. R. 202; *Page's Estate*, 75 Pa. St. 87; *McHugh v. McCole*, 97 Wis. 166, 72 N. W. R. 631; *Cowley v. Hartsonge*, 1 Dow. 361.

⁷ *Mower v. Orr*, 7 Hare, 473, 475.

specified in personal property, the income of which is to be paid to legatees, coupled with a power of sale over the land given to an executor, will, where the testator's estate consists wholly of land, amount to an imperative direction to sell the land, and it will convert the land as of the date of the testator's death.¹

But a mere direction to *divide the estate into shares*, though coupled with an express power of sale, does not, of necessity, convert land comprised in the estate, where the sale is only to take place in the discretion of the trustee, and if *he shall deem it necessary in order to pay debts and legacies*.² Where a testator, after giving a power of sale of the residue to his executors, directed them to "*pay and deliver*" a money legacy, and to "*pay and deliver*" the residue, the word "convey" not being used, the testator's real property included in the residue was regarded as constructively converted into personal property.³ Where a testator gave the residue of his estate to trustees to be by them divided among his children equally, either by investing it for them or by selling and paying the proceeds, giving the trustees full power of sale over his real estate, it was held that the whole estate was converted into money, though the trustees had a discretion to deliver the shares to the legatees or to hold them in trust for them.⁴

Summing up the whole matter, it may be said that while a mandatory express trust for sale is the most appropriate mode of effecting a constructive conversion, its absence from a will does not prevent one from resulting, if, upon the face of the will, it appears that the intention of the testator will be best carried out by constructively converting the property. That the testator seems in one clause of his will to leave the conversion of the property to the discretion of the trustees is not controlling, if upon the whole will it appears that a constructive conversion will best effectuate his intention. He may leave the actual sale or investment to the best judgment of the trustees, and then provide for the disposition of his property in such a

¹Roy v. Monroe, 47 N. J. Eq. 356, 20 Atl. R. 481; Affleck v. James, 17 Sim. 121. Brandreth, 28 Beav. 273; Burrell v. Baskerfield, 11 Beav. 525.

²Dodge v. Williams, 46 Wis. 70, 50

³Greenway v. Greenway, 1 Giff. N. W. R. 1103.

131, 29 L. J. Ch. 601, 605; Lucas v. ⁴In re Marshall's Estate, 147 Pa. St. 77, 23 Atl. R. 381.

way as will conclusively show that he intends that it shall be converted into real or personal property, as the case may be. He may leave a fund *in money* to trustees with a power to invest it in land at their discretion, and then dispose of the fund upon such limitations as are adapted exclusively to real estate. Such would be the case where, having devised lands to A. and his heirs absolutely, he left his money in trust to be settled, either in its original shape or as converted according to the trustees' discretion, to the *same persons and in the same manner as land heretofore devised*. Here the particular intention that the trustees shall exercise a discretion to convert is overcome by the general intention of the testator that those persons who will take the land devised absolutely to A. shall also take the money given him. Though the testator has omitted to command a conversion, his intention to have a conversion is clear, and that must be observed.¹

§ 700. A discretion as to the time and the place of sale does not prevent a constructive conversion.—A discretion in the trustee as to the time and mode of the sale does not prevent the conversion as of the date of the testator's death, where a sale is to take place at all events.² If the whole will clearly

¹In an early case in which this point was considered, Lord Hardwicke said: "This court never admits trustees to have such an election to change the right, unless it is expressly given to them. Here the money is to be laid out in land or securities for such uses as the land is before settled. If it is laid out in securities (which are personal), all the limitations might not take place; for if there was a son born, he would take the whole money as being tenant in tail, and the subsequent limitations would be defeated. The only way to make the clause consistent is, that the money be laid out in securities till lands are purchased, and the interest and dividends in the meantime go to such persons as would be entitled to the land." *Earlom v. Saunders*, Amb. 241.

²*High v. Warley*, 33 Ala. 196;

Hocker v. Gentry, 8 Metc. (60 Ky.) 463, 473; *Burnside v. Wall*, 9 B. Mon. (48 Ky.) 322; *Clay v. Hart*, 7 Dana (Ky.), 11, 17; *McCulloh v. Dashiell*, 1 Har. & G. (Md.) 96; *Smithers v. Hooper*, 23 Md. (1865), 273; *Romaine v. Hendrickson*, 24 N. J. Eq. 231; *Ness v. Davidson*, 49 Minn. 469, 52 N. W. R. 46; *Crane v. Bolles*, 49 N. J. Eq. 373, 24 Atl. R. 237; *Graham v. Livingston*, 7 Hun (N. Y.), 11; *Fisher v. Banta*, 66 N. Y. 468, 476; *Sayles v. Best*, 66 Hun, 628; *Bogert v. Hertell*, 4 Hill (N. Y., 1842), 492; *Stagg v. Jackson*, 1 N. Y. 206, 213; *Arnold v. Gilbert*, 5 Barb. (N. Y.) 190, 197; *Haxtum v. Corse*, 2 Barb. Ch. (N. Y.) 506; *Marsh v. Wheeler*, 2 Edw. Ch. (N. Y., 1836), 156; *Clift v. Moses*, 22 N. E. R. 395, 116 N. Y. 144; *Fraser v. Trustees*, 124 N. Y. 479, 26 N. E. R. 1034; *Powell v. Powell*, 6 Ired. (N. C.) Eq. 50; *Parkinson's Appeal*, 32 Pa.

indicates that real property must, *at all events* and in any case, be converted into money, though he has not fixed any particular time when the sale is to take place, the land will be regarded as converted as of the date of his death. For if land is to be sold "as soon as the trustee should see it is necessary for the beneficiaries' advantage,"¹ "with all convenient speed,"² "in such manner as the executor shall deem best,"³ "when and in the best manner possible,"⁴ "as soon as practical and proper, but within a year,"⁵ "to best advantage, in the sound discretion of the trustee,"⁶ "with all speed as soon as possible,"⁷ "in such manner and at such times as they think proper,"⁸ "as soon as convenient, consistent with a fair price to be obtained,"⁹ or "in a reasonable time, with all possible diligence,"¹⁰ the conversion will not depend upon the caprice, negligence or procrastination of the trustee in delaying a sale, but will be regarded as having taken place at the death of the testator.

§ 701. Conversion where no express power of sale is conferred.—It is not necessary, in order that land devised shall be constructively converted, that the testator shall, in express words, confer the power to sell it upon any particular person. If the testator intends that the land shall be sold, though he does not state by whom it is to be sold, a power of sale will be implied in the person who is to distribute the proceeds of the land when sold. Thus, if land is directed to be sold, and the proceeds are to be distributed in legacies by the executor, a power of sale by implication will be conferred upon him, and the land will be regarded and treated as constructively converted from the death of the testator, always provided the direction to sell is imperative.¹¹

St. 455; McClure's Appeal, 72 Pa. St. 414; Bell v. Bell, 25 S. C. 149; Tazewell v. Smith, 1 Rand. (Va.) 318; Rinehart v. Harrison, 1 Bald. C. C. 177; Chandler's Appeal, 84 Wis. 505; Smith v. Claxton, 4 Mad. 484; Doughty v. Bull, 2 P. W. 320; Deg v. Deg, 2 P. W. 412, 415. See also cases, § 702.

¹ Doughty v. Bull, 2 P. W. 320.

² Fitzgerald v. Jervoise, 5 Mad. 257.

³ Carr v. Brand, 85 Va. 597.

⁴ Arnold v. Gilbert, 5 Barb. (N. Y.) 190, 197.

⁵ Ingrem v. Mackey, 5 Redf. Sur. (N. Y.) 357, 359.

⁶ Martin v. Sherman, 2 Sandf. (N. Y.) 341.

⁷ Johnson v. Bennett, 39 Barb. (N. Y., 1863), 237, 241.

⁸ Walker v. Shore, 9 Ves. 386.

⁹ Irish v. Husted, 39 Barb. (N. Y.) 411, 417.

¹⁰ Hutchin v. Mannington, 1 Ves. Jr. 366.

¹¹ Winston v. Jones, 6 Ala. 550, 556, 557; Rankin v. Rankin, 36 Ill. (1865), 293; Trustees v. Fisher, 30 Me. 523,

§ 702. **The date at which constructive conversion takes place.**—The constructive conversion of land into money, or *vice versa*, when no time is mentioned for a sale or purchase, usually takes place as of the date of the death of the testator, where the legacy of the proceeds of the sale vests at that date. This is so when the actual sale is to be made whenever the trustee shall deem it advantageous,¹ or where the time of the actual sale is left wholly to the discretion of the trustee.² But

527; *Morton v. Barrett*, 22 Me. 257; *Going v. Emery*, 16 Pick. (Mass.) 107; *Lippincott v. Lippincott*, 19 N. J. Eq. 121, 122; *Hollman v. Tigges*, 42 N. J. Eq. 127, 130; *Bentham v. Wiltshire*, 4 Madd. 44; *Patton v. Randall*, 1 J. & W. 189; *Tylden v. Hyde*, 2 Sim. & St. 238; *Sugden on Powers*, p. 134; *Forbes v. Peacock*, 11 Sim. 152, 12 Sim. 528, 11 Mees. & Welsby, 630; *Robinson v. Lowater*, 17 Beav. 592, 5 De Gex, M. & G. 272. For other cases in which a power of sale is raised by implication in the executor, see *post*, §§ 782, 783.

¹*Robinson v. Robinson*, 19 Beav. 495. See *ante*, § 700.

²*Cunningham v. Moody*, 1 Ves. 176; *Crabtree v. Bramble*, 3 Atk. 680, 687; *High v. Worley*, 53 Ala. 196; *Loftis v. Glass*, 15 Ark. 680; *Stevenson's Estate*, 2 Del. Ch. 197; *Hooker v. Gentry*, 3 Metc. (Ky.) 463, 473; *Arnold v. Arnold*, 11 B. Mon. (Ky., 1850), 81, 88; *Geddes v. Inst.*, 13 id. 530, 537; *Nevitt v. Woodburn* (Ill., 1898), 51 N. E. R. 593; *Perkins v. Coughlin*, 148 Mass. 30; *Brink v. Layton*, 2 Redf. (N. Y.) 79; *Marsh v. Wheeler*, 2 Edw. Ch. (N. Y.) 156; *Cook v. Cook*, 20 N. J. Eq. (1869), 375, 377; *Dutton v. Pugh*, 45 N. J. Eq. (1889), 426, 429; *Crane v. Bolles*, 49 N. J. Eq. 373, 379; *Moore v. Robbins*, 53 N. J. Eq. 137; *Hughes v. Mackin*, 44 N. Y. S. 710; *Underwood v. Curtis*, 28 N. E. R. 585, 127 N. Y. 523; *Kane v. Gott*, 24 Wend. (N. Y.) 641; *Stagg v. Jackson*, 1 N. Y. (1848), 206, 212; *Arnold v. Gilbert*, 5 Barb. (1849), 190, 197; *Irish v. Hue-*

sted, 39 Barb. (N. Y.) 411, 417; *Kearney v. Missionary Soc.*, 10 Abb. N. C. 274; *Savage v. Burnham*, 17 N. Y. (1859), 561, 569; *Fisher v. Banta*, 66 N. Y. 468; *Lent v. Howard*, 89 N. Y. 169, 176; *Roberts v. Corning*, 89 N. Y. (1882), 225, 239; *Haxton v. Corse*, 2 Barb. Ch. (N. Y., 1848), 506, 519; *Forsyth v. Rathbone*, 34 Barb. (N. Y.) 388; *Johnson v. Bennett*, 39 Barb. 237, 241; *Van Vechten v. Van Veghten*, 8 Paige (1840), 104, 129; *Mutual Life Insurance Co. v. Bailey*, 45 N. Y. S. 1069; *Ex parte McBee*, 63 N. C. 332; *Parkinson's Appeal*, 32 Pa. St. 455, 458; *Chew v. Nicklin*, 45 Pa. St. 84, 88; *Horner's Appeal*, 56 Pa. St. 405, 408; *Allison v. Wilson*, 13 Ser. & R. (Pa.) 330; *Willing v. Peters*, 7 Pa. St. 287; *Brolasky v. Gally*, 51 Pa. St. 509; *Jones v. Caldwell*, 97 Pa. St. 42; *Evans' Appeal*, 63 Pa. St. 183; *McClure's Appeal*, 72 Pa. St. 414, 419; *McWilliams' Appeal*, 117 Pa. St. 111, 11 Atl. R. 383; *In re Thomman's Estate*, 29 Atl. R. 84, 161 Pa. St. 444; *In re Holder* (R. I., 1898), 41 Atl. R. 576; *Carney v. Kain*, 40 W. Va. 758, 23 S. E. R. 650; *Effinger v. Hall*, 81 Va. 94; *Milw. Home v. Becker*, 87 Wis. (1894), 409, 414; *Dewolf v. Lawson*, 61 Wis. 469, 479; *Ramsey v. Hanlon*, 33 Fed. R. 425; *Rinehart v. Harrison*, 1 Baldw. C. C. 117; *Beauclerk v. Mead*, 2 Atk. 167; *Hutchin v. Mannington*, 1 Ves. Jr. 336; *Robinson v. Robinson*, 19 Beav. 494; *Bourne v. Bourne*, 2 Hare, 35; *Barker v. May*, 9 Barn. & Cressw. 489; *Gibbs v. Angier*, 12 Ves. 413; *Smith v. Claxton*, 4 Mad. 484.

generally where the beneficiary of a trust for sale has no power, according to the terms of the will, to compel the trustee to execute his power of sale, the power is not imperative, and it does not therefore work a conversion. Thus, where the testator directs his executors to lay a sum of money out at interest for a beneficiary, or *at their option* to invest it in land for his use, no conversion takes place until the land is actually purchased;¹ for the legatee cannot compel the investment of the fund in land. If lands are directed to be sold, in language which works a conversion as of the date of the death of the testator, and the time of the sale is postponed or is left to the discretion of the trustee, or is dependent on the request or consent of the beneficiary, the rents issuing out of the lands until the sale belong to him who is to take the proceeds of the lands when sold, and they will go to him with the proceeds, or they may be paid to him in the interim.²

§ 703. The sale of land after the death of the tenant for life.—The fact that land is not to be sold until after the expiration of a life estate in it, created by the will, does not prevent a constructive conversion from taking place as of the death of the testator. Thus, if the testator gives the income of land to

¹ *In re Becker's Estate*, 150 Pa. St. 524, 24 Atl. R. 687.

² *Harcum v. Hudnall*, 14 Gratt. (Va.) 369, 381; *Pearson v. Lane*, 17 Ves. 101; *Casamajor v. Strode*, 19 Ves. 390; *Miller v. Miller*, L. R. 13 Eq. 263; *Burges v. Lamb*, 16 Ves. 190; *Cruikshank v. Chase*, 113 N. Y. 337, 21 N. E. R. 64. So, for illustration, if land is devised upon trust for sale and to pay the interest of the proceeds to A. for his life, A. will be entitled to receive the rent from the date of the death of the testator. "The direction that the executor should sell all his (the testator's) real estate operated as a conversion of the real estate into personalty from the time of his death. The direction is unqualified and peremptory. It leaves no discretion to the executor, except as to the time and manner of sale. The exercise of the power of sale is subject to no condition ex-

cept that which is implied in every case of this character, that, at the death of the testator, the purposes for which the conversion was directed have not failed, but still require that the power should be exercised. In all cases where conversion takes place, it is because the purposes of the will require it. The conversion may be entire, embracing the whole estate, or partial, extending only so far as is necessary to satisfy special purposes indicated in the will. The matter to be considered is the intention of the testator. The conversion, whether absolute to all intents, or partial only, is the one or the other because the purpose of the will, *i. e.*, the intention of the testator, was that the conversion should be general or partial, for all purposes or for limited purposes only." *Andrews, J.*, in *Fisher v. Banta*, 66 N. Y. 468, 476.

his widow for life, directing it to be sold at her death, and then bequeaths legacies to be paid out of the proceeds when sold, which legacies by the terms of the will *vest at his death*, the shares of the legatees who may die during the life of the widow will pass as money to their next of kin and not as land to their heirs.¹ But it must be noted that the rule that land is converted as of the date of the death of the testator is based upon a presumption of an intention where the will is silent as to the time of sale. It yields to a clear expression of a contrary intention fixing the time of sale in the future. If the testator expressly directs the sale to take place at a particular future time, as so many years after his death, or after a life estate, or if he has made it to depend upon the request or consent of others, no conversion takes place until the date arrives which is indicated by the will when it *ought* to be sold. When the time appointed by the testator for the sale actually arrives, the land will be converted as of that date whether the property is at that time sold or not.² And a sale of the land may be made at any time during the life-time of the life tenant, with his consent.³

§ 704. **Blending proceeds of land with personal property—The effects of.**—The blending of the proceeds of land which is directed to be sold with the personal property of the testator, while it may be a circumstance conclusive of an intention to convert the land, is not conclusive of an intention to convert it “out and out,” but only for the purposes of the will.⁴ If these purposes fail, the proceeds of the land must be separated from the personal estate. They may be constructively reconverted and will then go to the heir-at-law, though the testator has by his will given them as personal property to a legatee. And where the proceeds of land are comprised in a residuum and the re-

¹ *Allen v. Watts*, 98 Ala. 384; *Rumsey v. Durham*, 5 Ind. 71; *Reiff v. Strite*, 54 Md. 298; *McClure's Appeal*, 72 Pa. St. 414, 417; *Thomman's Estate*, 161 Pa. St. 444, 448; *Ropp v. Minor*, 33 Gratt. (Va.) 97; *Reinhart v. Harrison*, 1 Bald. C. C. 177, 187.

² *Savage v. Burnham*, 17 N. Y. 561, 569; *Moncrief v. Ross*, 50 N. Y. 436; *Ross v. Roberts*, 2 Hun (N. Y.), 90, 93,

63 N. Y. 652; *Richey v. Johnson*, 30 Ohio St. 288, 292; *Meehan v. Brennan*, 16 App. D. 395, 45 N. Y. S. 57; *Brothers v. Cartwright*, 2 Jones' Eq. (N. C.) 113; *McClure's Appeal*, 72 Pa. St. 414, 417. And see cases in note 2, page 965.

³ *Hamlin v. Thomas*, 126 Pa. St. 20.

⁴ See remarks of Sewell, M. R., 1 Bro. C. C. 497, on p. 499.

siduary bequest fails, it will not be presumed that the testator, because he gave the proceeds of his land away from his heir to A., the residuary legatee, wished to favor B., his next of kin, at the expense of his heir;¹ for where a sale of land is directed for the benefit of A., and the purpose of the testator to benefit A. has failed, it is absurd to think that he intended the sale to take place for the benefit of B., when, if he had not given the proceeds of the land to A., it would have gone unsold to C.² The fact that the testator, after devising land in trust for sale, directs in express terms that the proceeds of the sale are to be considered as part of his personal estate, does not, where there is a failure of the purpose of the conversion, prevent the creation of a trust for the benefit of the heir-at-law.³

In England it has been held, even where a testator expressly directed that the proceeds of the land should be deemed money, and that it should not in any event result to his heir, that, nevertheless, as between him and the residuary legatee, his claim was to be preferred in the case of a failure of the purpose of conversion.⁴ But the circumstances that a testator bequeaths money legacies which more than exhaust the personalty,⁵ and at the same time confers a power of sale over his land upon the executors, may indicate an intention to convert the land for the payment of the legacies which have been given. So, if it is apparent that the testator intended to reduce his whole estate to a common fund of personal property and to divide it as a residue, the executors to pay it over to legatees in that character, the land will be converted, even though no sale has been directed. Thus, a direction to add money to land, and to divide it, converts the land into money, for how otherwise can this direction be complied with?⁶ The real property may, by thus being blended with the personal

¹ *Ackroyd v. Smithson* (1780), 1 Bro. C. C. 503; *Jessop v. Watson*, 1 My. & K. 665, 667; *Eyre v. Marsden*, 2 Keen, 564, 574; *In re Schaufert*, 26 N. Y. S. 302, 74 Hun, 352.

² *Cruse v. Barley*, 3 P. Wm. 20; *Durour v. Motteux*, 1 Ves. Jr. 320; *Hutcheson v. Hammond*, 3 Bro. C. C. 148; *Gibbs v. Rumsey*, 2 Ves. & B. 294; *Emblyn v. Freeman*, Pre. Ch.

541; *Amphlett v. Parke*, 2 Russ. & My. 221, 1 Sim. 275, 4 Russ. 75; *Digby v. Legard*, 3 P. W. 22, 2 Dick. 500, note.

³ *Collins v. Wakeman*, 2 Ves. 683; *Countess of Bristol v. Hungerford*, 2 Vernon, 645.

⁴ *Fitch v. Weber*, 6 Hare, 145.

⁵ *Cf. ante*, §§ 374-377.

⁶ *Winston v. Jones*, 6 Ala. (1844), 550, 555. See also *post*, § 783.

property in a residuum, be regarded as constructively converted from the date of the death of the testator.¹ But this presumption of a conversion is not conclusive, and does not arise at all merely *from a direction to divide* land, unless there is also a power of sale in the executor or trustee, either in terms or by necessary implication.²

§ 705. Conversion depending upon a contingency, or upon the consent or request of a legatee.—In view of the rule that a direction to convert must be positive and imperative in order that it shall effect a constructive conversion, it has been held that a direction to sell land, or to invest money in land upon a contingency, will not operate as a conversion until, or unless, actual conversion is made. This rule is applied where a sale of land is to take place upon the request of a legatee, or with the consent of the beneficiary.³

Thus, where land was to be sold if the heirs should at any time agree to sell it,⁴ or where a will provided that land which was devised therein should be sold if the life tenant considered it to be to her advantage to sell it, and *on her request* only,⁵ or where the testator provided that, when his son attained full age, he should either have a farm or it *might be sold and the proceeds should be paid to him*,⁶ no constructive conversion took

¹ Brearly v. Brearly, 9 N. J. Eq. (1835), 21, 31; Ex'rs of Vanness v. Jacobus (1846), 17 N. J. Eq. 153, 154; Delafield v. Barlow, 107 N. Y. 535; Paist's Appeal (Pa., 1889), 17 Atl. R. 6; Fletcher v. Ashburner, 1 Bro. C. C. 497; Durour v. Motteax, 1 Ves. 320; Stagg v. Jackson, 1 N. Y. 206; Burr v. Sim, 1 Whart. (Pa.) 252; Hill v. Bean, 29 Atl. R. 986, 86 Me. 200.

² Hobson v. Hale, 95 N. Y. 583; Hale v. Hale, 125 Ill. 399; Clarke's Appeal, 70 Conn. 195, 483, 39 Atl. R. 155, 162; In re Bingham, 127 N. Y. 296; Lindley's Appeal, 102 Pa. St. 235.

³ Keller v. Harper, 64 Md. 74; Nagle's Appeal, 13 Pa. St. 260, 263; Miller's Appeal, 60 Pa. St. 404, 407; Irvin v. Patchen, 30 Atl. R. 436, 164 Pa. St. 51, 65, 35 W. N. C. 341; In re Macheimer's Estate, 130 Pa. St. 544, 21 Atl. R. 441; Neely v. Grantham, 58 Pa.

St. 433, 437; Henry v. McCloskey, 9 Watts (Pa.), 145, 147; Chew v. Nicklin, 10 Pa. St. 131; Washington v. Abraham, 6 Gratt. (Va.) 66; Stoner v. Zimmerman, 21 Pa. St. 394, 402. Cf. Porterfield v. Porterfield, 85 Md. 633.

An option in trustees to sell with the consent of the testator's widow does not effect a conversion, though it is followed by an imperative direction to divide the estate equally among certain persons. In re Wintle, Tucker v. Wintle (1896), 2 Ch. 711. See also De Beauvoir v. Beauvoir, 3 H. L. Cas. 524; Lucas v. Brandreth, 28 Beav. 273.

⁴ Greenough v. Small, 137 Pa. St. 128, 20 Atl. R. 128.

⁵ In re Pyott's Estate, 160 Pa. St. 441, 28 Atl. R. 915, 921.

⁶ Anewalt's Appeal, 42 Pa. St. 414.

place. So where a sale is to be made with the "*joint consent and approbation* of a husband and his wife, and not without," no conversion takes place unless both consent. And not only does no constructive conversion take place until consent is given, but if the consent or the request of a third person is an *absolute prerequisite to an actual conversion* of land or money, actual conversion without his consent or request is, *as to him*, null and void. The property in its changed form will be constructively reconverted into its original condition so far as he is concerned.¹ But where the direction to sell land or to invest money is positive and imperative, or where the general scheme of the will requires a constructive conversion, and the provision requiring the consent or the request of another is designed merely to enforce the trust and obligation to convert and to protect the beneficiary, the property will be constructively converted, though he refuse or fail to request or to consent.² And it has been held that, where the limitations of the property in trust are only applicable to real property, a direction to invest money in real estate, on the request of certain persons, could be executed without request, for this direction to invest on request was evidently intended to give the beneficiary the power to enforce the direction and not to prevent it from being carried out.³ The person who is to make the request for an actual conversion will not be permitted to refuse or to delay making the request to the prejudice of others' interests.⁴ And if he shall do so, or if he shall die without having made the request or given his consent, equity will regard it as having been done or given, and will decree a sale or a purchase of land as may be required, with a constructive conversion as of the date of the death of the testator.⁵ The death

¹ *Davis v. Goodhue*, 6 Sim. 585; *In re Taylor's Trust*, 9 Hare, 596; *Sykes v. Sheard*, 33 Beav. 114.

² *Mellon v. Reed*, 123 Pa. St. 1, 15 Atl. R. 906; *Lechmere v. Carlisle*, 3 P. W. 211, 219, 223; *Pulteney v. Darlington*, 1 Bro. C. C. 228, 238; *Thornton v. Hawley*, 10 Ves. 129; *Symons v. Rutter*, 2 Vern. 227.

³ *Thornton v. Hawley*, 10 Ves. 129; *Triquet v. Thornton*, 13 Ves. 345.

⁴ Often by statute equity has juris-

diction to decree a sale where the consent which is required is unreasonably withheld, and the court has also the power to determine what is a reasonable time within which consent should be given. *In re Freeman's Estate*, 181 Pa. St. 405, 409, 37 Atl. R. 591; Act April 18, 1853.

⁵ *In re Tweedie & Miles*, L. R. 22 Ch. D. 284, 27 Ch. D. 315; *Lord v. Wightwick*, 4 De Gex, Mac. & G. 803, 6 H. L. Cases, 217.

of the person who is to give his consent or to make a request may prevent the actual conversion where conversion is *absolutely dependent upon consent or request*.¹ So where a testator directs the sale of his land to be made, but only upon the request of a majority of persons named, a majority of the whole number previously named is required, though some have since died.² And finally it may be said that, where a power to sell lands or to invest money in lands is discretionary, or is to be executed on request or with consent, and the power is partially executed, but fails of a complete execution either by reason of the death of the trustee or of the person who is to give consent, the persons absolutely entitled and the heirs must take the land in its partially converted condition, they taking land or money as it is.³

§ 706. A direction to sell at a fixed price.—Whether a direction to sell land, providing a certain price can be obtained for it, shall operate as a constructive conversion of the land, depends upon the intention of the testator, to be gathered from the whole will. If a sale is positively forbidden *unless the particular price can be obtained*, no conversion takes place until the sale is in fact made. But if a sale is directed to take place as soon as a price, which is specified, can be obtained, or as near that price as may be possible, it has been held that a constructive conversion takes place, the limitation in price being advisory and not mandatory.⁴

§ 707. The effect of an option to purchase given to a beneficiary.—The fact that the testator gives a devisee of land which is devised either to him or to others, in trust for sale,

¹ In re Taylor's Trust, 9 Hare, 596; Gulick v. Griswold, 14 App. Div. 85.

² Crane v. Bolles, 49 N. J. Eq. 373, 24 Atl. R. 237. Where land is given in trust to sell to pay debts and then to beneficiaries absolutely, the trustee can exercise his power of sale, and he can convey a good title without the consent of the beneficiaries, unless it is expressly required, so long as the power of sale is necessary to carry out the trusts in the will. In re Dyson (1896), 2 Ch. 720. A direction to sell land at the request of

certain persons, the land not being actually devised to any one, creates a power of sale by implication in the executors. Potter's Ex'rs v. Adriaance, 44 N. J. Eq. 14, 14 Atl. R. 16. Where a request is required, it need not be in writing nor in any particular form. Rogers v. Tyley, 144 Ill. 652, 32 N. E. R. 393.

³ Walter v. Maunde, 19 Ves. 424.

⁴ Ford v. Ford, 70 Wis. (1887), 19, 44 N. W. R. 1057; Benbow v. Moore, 114 N. C. 263.

an option to purchase it, does not, where it is a mere privilege of buying the land, prevent a constructive conversion as of the date of the death of the testator,¹ where the direction to sell is mandatory. The devisee to whom the option is given, unless his right to purchase is to be prior to that of any and all other persons, has nothing more than he possessed before. Accordingly, where a testator directs that his executors must sell his land either to the beneficiary or *to some one else*, the direction is immaterial,² though if he directs that a sale of the land shall depend upon the choice of a devisee or upon any other contingency, as where the testator directs that beneficiaries shall have the right to take the land at an appraised value if they can agree to do so,³ the creation of such an option will prevent a constructive conversion and the land will not be converted unless it is actually sold.⁴

§ 708. Conversion in the case of land contracted to be sold by the testator.—The doctrine of conversion applies to a devise of land which has been contracted by the testator to be sold. As soon as land is contracted to be sold it is, in equity, considered as converted into money as of the date of the contract. So where a testator contracts to sell land, from the instant of entering into the contract he holds the legal title solely as a trustee for the vendee, and his general or specific devisee of that land can only take the title the testator has, which is subject to the contract of sale. The devisee of the land is a trustee for the vendee of the testator. Assuming that the contract is valid and binding on both parties at the death of the testator, the devisee of the vendor may be compelled to transfer the legal title to the vendee, and he cannot, as in the case subsequently mentioned,⁵ claim to have the purchase-money paid to him by the vendee. That must be paid to the executor of the vendor for the benefit of his personal estate,⁶ and it will pass under a general or residuary bequest of personal property contained in the will of the vendor, *no matter when that will*

¹ *Fahnestock v. Fahnestock*, 152 Pa. St. (1893), 56, 62; *Laird's Appeal*, 85 Pa. St. 339, 343.

² *Hammond v. Putnam*, 110 Mass. (1872), 232.

³ *Jones v. Caldwell*, 97 Pa. St. 42, 46. See *ante*, § 706.

⁴ *Anewalt's Appeal*, 42 Pa. St. 414, 416. See *ante*, § 705.

⁵ § 709.

⁶ *Knollys v. Shepherd*, 1 Jac. & Wal. 499; *Wall v. Bright*, 1 Jac. & Wal. 494; *Lawes v. Bennett*, 1 Cox, 166, 171.

was executed. Having been contracted to be sold after the execution of the will of the vendor, the land will be regarded as having been sold; and, though the legal title has not been conveyed to the vendee, the devise is regarded as adeemed, and the purchase-money is to be paid, not to the devisee of the land, but to the executor of the vendor.¹

If, however, *neither party to the contract* has a right to have it enforced, there is no conversion. The property retains its original character of land. The executor of the vendor has then no right to the purchase-money, and the land which is comprised in the invalid contract goes to the heir or to the specific or residuary devisee. So, if the parties have agreed that the contract, though it may be enforceable in equity, shall, on the happening of some event, be null and void, and that event happens, the land and money retain their original state.²

¹ *Baden v. Pembroke*, 2 Vern. (1690), 213; *Eaton v. Sanxter*, 6 Sim. 517, 522; *Farrar v. Earl of Winterton*, 5 Beav. 1, 8; *Watts v. Watts*, L. R. 17 Eq. 217, 221; *In re Manchester Company*, 19 Beav. 365, 369; *In re Dyke's Estate*, L. R. 7 Eq. 337, 342; *Moor v. Raisbeck*, 12 Sim. 123; *Saunders v. Kramer*, 3 Dr. & W. 99; *McKinnon v. Thompson*, 3 Johns. Ch. (N. Y.) 307; *Wright v. Minshall*, 72 Ill. 584; *Newport Waterworks v. Sisson*, 18 R. I. 411, 412, 28 Atl. R. 336; *Craig v. Leslie*, 3 Wheat. (U. S.) 563; *Haughwout v. Murphy*, 22 N. J. Eq. 541, 536; *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 312; *Williams v. Haddock*, 145 N. Y. 144, 150, 157. Cf. *Hunter v. Mills*, 29 S. C. 72. *Contra* by statute in *Chadwick v. Tatem*, 9 Mont. 354, 23 Pac. R. 729; and compare *Taylor v. Hargroove*, 101 N. C. 145, 7 S. E. R. 647; *In re Lefebvre's Estate* (Wis., 1898), 75 N. W. R. 971. After the execution of a contract for the sale of land the vendee is the equitable owner, and the interest of the vendor is converted into personalty; and hence, on his death, the purchase price belongs to his residuary legatees and not to the persons to

whom he has specifically devised the land, though they will be compelled to execute a deed to the vendee. *Newport Waterworks v. Sisson*, 28 Atl. R. 336.

² *Attorney-General v. Day*, 1 Ves. Sr. 218, 220. Though a contract for the sale of land provided that, on the vendee's failure to pay the price at the stipulated time, all his interests thereunder shall cease, the interest of the vendor, on his death before the time named for payment, is to be treated as personalty, there being no default by the vendee. *Williams v. Haddock*, 39 N. E. R. 825, 145 N. Y. 144. "It is very clear that if a man seized of real estate contract to sell it, and die before the contract is carried into execution, it is personal property of him. . . . It seems to me to make no distinction at all. Suppose a man should bargain for the sale of timber provided the buyer should give proper security for the payment of the money; this, when cut down, would be part of the personal estate, although it depends upon the buyer whether he gives the security or not. When the party who has the power of making

§ 709. **Conversion in the case of lands contracted to be bought by the testator.**—In the absence of statute creating the power to devise after-acquired lands, a devise included only lands to which the testator had the legal title at the date of the will.¹ Hence, if at the execution of the will he was under contract to purchase lands, the legal title to which he had not taken at his death, the legal title did not pass by a general devise. The equitable title of the testator in the contract passed to the residuary devisee, while the legal title at his death passed to his heirs,² whom equity would treat as a trustee for the devisee. He would be compelled to pay the purchase-money to the devisee. Modern statutes conferring power to devise land acquired subsequently to the execution of a will have obviated the necessity for the interference of equity in such a case. If at the date of his death the testator is under a binding and valid contract to purchase land, but he has not taken title, his general or residuary devisee may claim the land under the contract.³

The personal property of the testator, which would have paid for the land had he survived, is regarded as constructively converted into land as of the date of the contract,⁴ and the heir or the devisee may call upon the executor or administrator of the vendee to pay the purchase-money out of the personal estate.⁵

the election has elected, the whole is referred back to the original agreement, and the only difference is that the real estate is converted into personal at a future period." *Lawes v. Bennett*, 1 Cox, 167, on p. 171 (1758). The right of the testator to sue for a breach of a contract to sell land, which is pending at his decease, devolves upon his executor, and not upon his devisee of the land. *Irwin v. Hamilton*, 6 Serg. & R. (Pa.) 208. A. entered into a contract to purchase land of the testator. Before the conveyance had been executed, or the purchase-money paid, the testator died, having devised the land to A. as tenant in common with another. The court held that A. might elect to take under the will and he might repudiate the contract. Hav-

ing assented to the devise, the legal title to the land became at once vested in him and the other devisee, and the executor of the vendor could not enforce the contract against him. *Taylor v. Hargrove*, 101 N. C. 145, 7 S. E. R. 647.

¹ *Ante*, §§ 21, 61-64.

² *Greenhill v. Greenhill*, Pre. Ch. 320; *Green v. Smith*, 1 Atkyns (1783), 572, 573; *Acherley v. Vernon*, 9 Mod. 68, 78.

³ *Williams v. Hassel*, 73 N. C. (1875), 174, 177.

⁴ *Whittaker v. Whittaker*, 4 Bro. C. C. 30.

⁵ *Broome v. Monck*, 10 Ves. 597, 612, 615; *Garnett v. Acton*, 28 Beav. 333; *Langford v. Pett*, 2 P. W. 629, 632; *O'Shea v. Howley*, 1 Jo. & Lat. 398.

So where an owner of land had engaged a builder to erect a house upon it, and pending the erection of the house the owner died, the court of chancery held that not only was the heir entitled to the house completed, but that he might call upon the administrator of the ancestor to pay for it.¹ And if the devisee has to pay it out of his own pocket, he may call upon the executor to reimburse him. But at the present time by statute in England,² and in many of the states of the American Union, the right of the heir or a devisee to call for the exoneration out of the personal estate of land which descends or which is devised is absolutely abolished. While these statutes relieve the personal estate from its primary burden of paying the purchase-money, they do not affect the principle of conversion, and the property contracted for passes as land under the will. As a result of the conversion of personal property into real, which takes place as soon as one has purchased real estate though he has not completed the payment for it, the money is regarded as land, *irrespective of intention*. It would pass under a general devise of land, and if the devisee is an alien who is incompetent to take real property the devise would fail, though the alien was competent to take it if it had remained personal property.³

But it must always be proved, in order that the personal representative of the testator shall be compelled to pay for the land, that the testator at his death was liable to an action on the part of the vendor to enforce the contract. For if the vendor had a bad title, or if the contract was not binding upon the vendee, or if it would have been set aside in a court of equity,⁴ no conversion of money into land takes place, as between the executor of the vendee and the devisee of the vendee. Nor can the court inquire by means of parol evidence into the circumstances to ascertain whether the testator in fact intended to complete or to rescind the contract for the purchase of the land; for the fact that it was binding at his death is conclusive,

¹Cooper v. Jarman, L. R. 3 Eq. 98. where a trustee is directed to sell

²Locke King's Act, 17 & 18 Vic., c. 113; 30 & 31 Vic., c. 69; 40 & 41 Vic., c. 34. land, and, without authority, buys it for himself, if by sustaining the actual conversion the interest of the

³Harney v. Donohoe, 10 S. W. R. 191, 97 Mo. 141. beneficiaries will be prejudiced in the slightest degree. Equity will direct a constructive reconversion.

⁴It may be well to note in this place that no conversion takes place Ingle v. Richards, 28 Beav. 861.

§ 711. Conversion in the case of land taken for public use. Where land is taken by a railroad or other corporation by virtue of the right of eminent domain which has been delegated to it by the legislature, it becomes important to determine at what date the land is converted, in order to ascertain what disposition shall be made of the proceeds where the owner dies before the money is actually paid to him. In England it has been both held¹ and denied² that a notice to treat for land given by a railroad company converts it, and creates the relation of vendor and vendee between the parties. The negative of this proposition would seem more reasonable than the affirmative, for no contract can exist between the parties until an agreement as to the price and subject-matter is reached; nor can the land be considered as actually appropriated until an actual entrance is made upon it by the company. Other cases have held, therefore, that the conversion takes place, under these circumstances, only when the value of the land is fixed in proper legal proceedings.³

ant, is realty and will pass as such until it is actually redeemed. In *re White's Estate*, 167 Pa. St. 206, 31 Atl. R. 569. *Cf.* In *re Hirst's Estate*, 147 Pa. St. 319. But it has also been held that no conversion of a ground rent takes place when it is paid off to trustees without choice on their part though they had a power of sale. In *re Ingersoll's Estate*, 167 Pa. St. 536, 36 W. N. C. 251, 31 Atl. R. 860. In *Edwards v. West*, L. R. 7 Ch. D. 858, the court, while affirming *Lawes v. Bennett*, refused to extend its application. The conversion which is made under an option will not be taken to extend by retrospection, prior to the date of the option. In this case a lessee had an option to purchase, in a fixed time, for £15,200, and the landlord had agreed to insure for £14,000. *After the premises* had been burned and the insurance money paid to the landlord, the lessee exercised his option and claimed the insurance money upon the ground that the conversion related back to the date

of the option, and that, though the property had been actually converted into money by the action of the landlord in receiving the money from the company, as to him the insurance money ought to be constructively reconverted into land. The court, in deciding against him, distinguished this from a case arising between real and personal representatives of a deceased person. See also *Reynard v. Arnold*, L. R. 10 Ch. App. 386, where the disposition of insurance money on property which the lessee had an option to purchase is discussed.

¹ *Regent's Canal Co. v. Ware*, 23 Beav. 573, 575, 582; *Stone v. Blackwall*, 4 Myl. & Cr. 122; *Ex parte Hawkins*, 13 Sim. 569, 579; *Walker v. Railway Co.*, 6 Hare, 594.

² *Railway Co. v. Woodhouse*, 11 Jur. (N. S.) 296; *Haynes v. Haynes*, 1 Dr. & Smale, 426, 430, 446; *Richmond v. Railroad Co.*, L. R. 3 Ch. App. 679, L. R. 5 Eq. 352, 358. *Cf.* *Ex parte Arnold*, 32 Beav. 591.

³ *Harding v. Railroad Co.*, L. R. 7

If the company and the owner waive all judicial proceedings looking to a condemnation of the land, and agree upon a price for the land, the contract is then complete, and the land is converted from the date of the agreement as in the case of an ordinary contract of sale.¹ So, in a case where the land-owner, having devised the land, agreed with a railroad company to sell it, and then died *before receiving the purchase-money*, but without altering his will, the devise is adeemed and the executor is entitled to receive the purchase-money from the company.² In the United States the cases seem to turn upon the question whether or not the land, or any interest in the land, has been actually taken, irrespective of whether the money has been paid for it or not. If the land has been actually taken it will be regarded as converted into personal property as of the date of the taking, and if the owner dies and the money is paid, the proceeds will pass as personalty.³ If the owner of the land devises it, and, subsequent to the execution of the will, it is taken in condemnation proceedings, and the testator dies before receiving the money, the devise will be adeemed, and the proceeds, though not in his possession, will, when paid, go to his executor.⁴

An order of a court of competent jurisdiction directing that land shall be sold amounts to a constructive conversion of the land as of its date, though the actual sale does not take place until long subsequently thereto.⁵ After the entry of the order, the rights of all the parties and of all persons claiming under or through them are determined upon the assumption that *the land has actually been sold*, unless it is clearly apparent that *some one will be inequitably treated by this assumption*. This

Ch. App. 154; *Watts v. Watts*, L. R. 17 Eq. 217; *Haynes v. Haynes*, 1 D. & Sm. 428, 439.

¹ *Ex parte Hawkins*, 13 Sim. 569, 578; *Nash v. Commissioners*, 1 Jur. (N. S.) 973; *Ex parte Arnold*, 32 Beav. 591.

² *In re Manchester Co.*, 19 Beav. 365.

³ *Welles v. Cowles*, 4 Conn. (1822), 182; *Parker v. Chestnutt*, 80 Ga. 12, 5 S. E. R. 289; *Peoria, etc. Co. v. Rice*, 75 Ill. 329; *Satterfield v. Crow*, 8 B. Mon. (Ky.) 553; *Neal v. Knox, etc. Co.*, 61 Me. 298; *Boynton v. Peter-*

borough, etc. Co., 4 Cush. (Mass.) 467; *Hotchkiss v. Auburn R. R. Co.*, 36 Barb. (N. Y.) 600.

⁴ See § 708. Where property devised in trust, the income only to be paid to a beneficiary, is sold in condemnation proceedings, the money is not income to be paid to a beneficiary, but a capital to be held under the original trust. *Gibson v. Cooke*, 1 Met. (Mass.) 75, 76; *Holland v. Cruft*, 3 Gray (69 Mass., 1855), 162, 180.

⁵ *Hyett v. Meaken*, L. R. 25 Ch. D. 735.

rule of a constructive conversion by court order before an actual sale is applicable to the property of a person who is competent to manage his own affairs. Thus, where an order that land shall be sold in partition has been made, and subsequently thereto, but *before the sale*, a party to the action dies, his share of the land will be treated as personal property as between his heir and his next of kin if he were intestate, and as between his devisee and his executor if he has died after making a will. The deceased, having the capacity and being absolutely entitled, could have disposed of the ultimate proceeds of the sale to any person he might have chosen, either as money or as land; but when he has neglected to elect, equity will follow the law — it will go to his next of kin.

The question as to the disposal of the proceeds of the sale of land owned by infants and other incompetent persons often comes before courts of equity. In the former case the land was converted with the consent of the competent owner, or, at least, his failure to dispose of it was an estoppel upon those who represent him; while in the latter case the deceased owner was absolutely unable to take any action in the matter at all.

§ 712. **Conversion by an order of court of land belonging to an infant or a lunatic.**— Land which is owned by a person who is *non compos mentis* or which belongs to an infant is frequently directed to be sold by an order of a court having competent jurisdiction, either in a direct proceeding brought for the purpose by the committee or guardian of the incompetent person, or in a collateral action to which the incompetent is a party. The question may then arise either as between the next of kin and the heirs of the incompetent person if he has died intestate before acquiring or regaining competency; or in the construction of his will, if he dies testate, whether the proceeds of the sale of the land shall be treated as personal property or as constructively reconverted into land.

The jurisdiction of equity over the estate of an incompetent person is exercised solely and exclusively to protect his property interests. The court in making orders for the disposition of his property is not in any way concerned as regards the interests of those who stand in the relation of expectant owners of such property on the death of its present owner, but will confine its action to the protection and preservation of the

property rights of the person under its care who is either in law or in fact unable to protect and defend his own. The representative of the incompetent person will, in the absence of statute, therefore, upon his decease receive the property in its actual condition at that period. But in England it is expressly provided by statute,¹ that, in the case of a sale, mortgage, change or other disposition of a lunatic's land, after answering the purpose for which the change has been directed, the surplus is to be taken as of the same nature and character as the estate sold or otherwise disposed of. The proceeds of the sale of the real estate of the lunatic are to be held as real property by his committee, and on his death, unless he shall recover and elect to take the property converted, the money realized from a sale of his real property will devolve as land upon his heir.²

In the United States, so far as the matter is not expressly regulated by statutes which are similar in their provisions and operation to the English enactment mentioned, land or personal property actually converted by judicial order during the existence of the incapacity will retain the new character impressed upon it, and will devolve as such upon the successors of the lunatic. A devise of land by the lunatic in a will executed before the appointment of a committee, or even afterwards, where it is shown that he possessed testamentary capacity,³ will be annulled *ipso facto* by a sale of the land under an order of the court, and the proceeds will pass as personal property.⁴

¹ Lunacy Regul. Act, 1853, 16 and 17 Vict., c. 70, 119.

² In re Stewart, 1 Sm. & Gif. 32, 39; In re Bagot, 31 L. J. Ch. 772; In re Mary Smith, L. R. 10 Ch. App. 79, 84; In re Barker, L. R. 11 Ch. D. 241; In re Skeggs, 2 De Gex, J. & S. 538; Dixie v. Wright, 32 Beav. 662; Kelland v. Fulford, L. R. 6 Ch. D. 491; In re Wharton, 5 De Gex, M. & G. 83; Smith v. Bayright, 34 N. J. Eq. 424; Jacobus v. Jacobus, 36 N. J. Eq. 248. When the real estate of an infant is converted into money by order of court, and the infant dies before attaining its majority, the fund will be treated as real estate, and as such descend

to the heirs at law of the infant. Wetherill v. Hough, 52 N. J. Eq. 683, 688, 29 Atl. R. 592.

³ See §§ 97, 98.

⁴ A testator who was entitled to a ground rent devised it to several, one of whom was a lunatic. The legatees released it to the testator's grantee under a covenant by him to do so, the committee of the lunatic having procured the permission of the court to join therein. Held, that the lunatic's share was personal property and went to his administrator on his death. In re Hirst's Estate, 147 Pa. St. 319, 23 Atl. R. 455.

In all these cases, in which the actual conversion of the property of an incompetent person has been permitted by the court of equity to result in its appropriate results so far as the devolution of the property was concerned, it will be found that there *was no equity existing in favor of a constructive reconversion*. That is to say, it will be found that neither the incompetent person himself was deprived of any right or privilege in relation to his property, nor that there was any living person who was in anywise prejudiced by allowing the property which had been altered in its character to continue to retain the new character which had been imposed upon it by the order of the court. The English cases insist that the necessity for a constructive reconversion shall appear in order that it shall be decreed where the character of land or personal property is altered by an order of a court. Thus, in the case of land or personal property belonging to an infant, the actual character of which is changed by an order of a court, no constructive reconversion takes place unless there *be an equity for a reconversion*.¹ But as an infant may, in some cases, dispose of his personal property by will before he attains majority, while he is not capable of devising his real property before he attains majority, equity may decree a constructive reconversion where the property of an infant was converted by an order of the court. To refuse to do this and to hold that the property was absolutely converted would, in the case of the investment of money in land, deprive him of the power of bequeathing personalty which the law gave him, while in the case of the sale of land it would confer upon him a power not recognized by the law.² The same rule is applicable in

¹ Steed v. Preece, L. R. 18 Eq. 192, where land of which an infant was a joint tenant in tail with another was sold. The infant, who would have been entitled to the money absolutely on his attainment of majority, died under twenty-one, and, on his co-tenant claiming his share, the court held that he had no equity and that the land had been converted for all purposes.

² Ex parte Phillips, 19 Ves. 122; Rook v. Worth, 1 Ves. 461; Ware v. Polhill, 11 Ves. 278; Kelland v. Ful-

ford, L. R. 6 Ch. D. 491. When personal property of an infant is invested by his guardian in real estate, either by authority of a court or upon the guardian's own responsibility, the character of such property is not changed, but it is regarded as being still personal estate, for the purpose of distribution on the infant's death, and otherwise. Decree (Sur., 1897), 46 N. Y. S. 908, 20 Misc. R. 532, affirmed; In re Bolton, 56 N. Y. S. 1105.

the absence of statute in the United States. Thus, where real estate which is owned by several tenants in common, one of whom is an infant, is sold in a partition suit, the portion of the proceeds of the sale belonging to the infant owner will retain its original character as real property, and as such will not pass under a residuary clause in his will.¹ The proceeds of the land sold in partition devolve upon the heir² of the infant as money, and on *his* death they go to his personal representatives and not to his heirs at law.³ But a statute regulating partition proceedings which expressly provides that a judgment of sale shall be conclusive on the parties and that the distributive shares of all parties shall be paid to them, their guardians or personal representatives, clearly indicates that the proceeds of the sale are to be considered money for all purposes, and, on the death of the infant party in partition, it is to be distributed and regarded as personal property.⁴

§ 713. **The effects of a constructive conversion.**—Where money is directed or agreed to be invested in land, or land is to be sold and turned into money, the property which is dealt with will, by its constructive conversion, have imposed upon it all those qualities which adhere to that species of property into which it is directed or contracted to be converted. Thus, land which is constructively converted into money will, upon the death of a legatee, go to his next of kin under the statute of distribution. Where the legatee is a married woman, her share of land which is constructively converted vests as personal property at the death of the testator in her husband, who may at common law claim it as personal property, though the land was not in fact sold until after her death.⁵

¹ *Horton v. McCoy*, 47 N. Y. 21, 27; and compare *Wetherill v. Hough*, 52 N. J. Eq. 683, 29 Atl. R. 592; *Foster v. Foster*, L. R. 1 Ch. D. 588. See also *post.* § 713.

² *Wetherill v. Hough*, *supra*.

³ *Fidler v. Higgins*, 21 N. J. Eq. 138; *Snowhill v. Snowhill*, 8 N. J. Eq. 20; *Shumway v. Cooper*, 16 Barb. (N. Y.) 556; *March v. Berrier*, 6 Ired. Eq. (N. C.) 524; *Mordaunt v. Benwell*, L. R. 19 Ch. D. 302.

⁴ *Beach v. Simmons*, 55 Ark. 485, 18 S. W. R. 933.

⁵ *Green v. Johnson*, 4 Bush (Ky.), 164; *Rawling v. Landes*, 2 Bush (Ky.), 158, 161; *Thomas v. Wood*, 1 Md. Ch. 296, 299; *Johnson v. Bennett*, 39 Barb. (N. Y.) 237, 241; *Proctor v. Ferebee*, 1 Ired. (N. C., 1840), Eq. 143, 147; *McClure's Appeal*, 72 Pa. St. 414. This is the rule, though the proceeds of the sale of land were not paid to the husband until *after* the adoption of a statute which deprives him of the control of his wife's personal property. *Benbow v. Moore*, 19 S. E. R. 156, 114 N. C. 263.

Personal property constructively converted under a will by a direction that it shall be invested in land does not pass by a bequest of personal property, general or residuary.¹ But money which is thus constructively converted will pass under a general or residuary devise of land, or of my land, or of real estate, in the will of him to whom it is devised.² On the other hand, where the land is converted constructively into money, with a direction to pay all or a part of the proceeds to a legatee, he may bequeath it by a will disposing of his personal property. The share of the proceeds given to him will pass under a general or residuary bequest of his personal property;³ while if he shall die intestate it will go to his administrator for the benefit of the next of kin.⁴ Real property which has been constructively converted into personal property by a contract to sell or by an imperative direction to sell will pass as personal property under the will of an infant who is entitled to share in it, though the infant is incompetent to make a will disposing of his lands.⁵ It was held at a very early date that

¹ *Edwards v. Countess of Warwick*, 2 P. Wms. 171; *Gillies v. Longlands*, 4 De Gex & Sm. 372; *Chandler v. Pocock*, L. R. 15 Ch. D. 491; *Cookson v. Cookson*, 12 Cl. & Fin. 121. If it is described as the *money* left me by will, or as *certain money* directed to be invested in land, it will pass as money.

² *Lingen v. Sowray*, 1 Peere Williams (1710), 172; *Hickman v. Bacon*, 4 Bro. C. C. 333; *In re Scarth*, L. R. 10 Ch. D. 499; *Chandler v. Pocock*, L. R. 15 Ch. D. 491, 499; *Lechmere v. Earl of Carlisle*, 8 P. W. 311; *Guidot v. Guidot*, 3 Atk. 254, 256; *Rashleigh v. Master*, 1 Ves. Jur. 201, note p. 205; *Wall v. Colshead*, 2 De Gex & Jo. 683; *Biddulph v. Biddulph*, 12 Ves. 161; *Green v. Stephens*, 17 id. 64, 77, 12 Ves. 419; *Green v. Johnson*, 4 Bush (Ky.), 164; *Gott v. Cook*, 7 Paige (N. Y.), 521, 524; *Hawley v. James*, 5 Paige (N. Y.), 318, 443. Moneys impressed with a trust to invest in land will pass under a devise of land; but where the money may be invested

anywhere in the country, it will not pass under a devise of land in a certain place. *In re Duke of Cleveland's Estates* (1893), 3 Ch. 244.

³ *Allen v. Watts*, 98 Ala. 384; *Elliott v. Fisher*, 12 Sim. 505, 506; *Stead v. Newdigate*, 2 Mer. 521; *Spencer v. Wilson*, L. R. 16 Eq. 501; *Gover v. Davis*, 29 Beav. 222, 225.

⁴ *Loftis v. Glass*, 15 Ark. 680; *Maddox v. Dent*, 4 Md. Ch. 543; *Smithers v. Hooper*, 23 Md. 273; *Wurts v. Page*, 19 N. J. Eq. 365; *Fisher v. Banta*, 66 N. Y. 468, 476; *Hood v. Hood*, 85 N. Y. 561; *Van Vechten v. Keator*, 63 N. Y. 52; *Moncrief v. Ross*, 50 N. Y. 431; *Jones v. Caldwell*, 97 Pa. St. 43, 46; *Eby's Appeal*, 84 Pa. St. 241; *Wilkins v. Taylor*, 8 Rich. Eq. (S. C.) 291; *Ashby v. Palmer*, 1 Mer. 296; *Burton v. Hodsoll* (1827), 2 Sim. 24, 32; *Briggs v. Andrews*, 5 Sim. 424, 430; *Griffiths v. Ricketts*, 7 Hare, 299; *Hardey v. Hawkshaw*, 12 Beav. 252.

⁵ *Horton v. McCoy*, 47 N. Y. 21, 27; *Harcum v. Hudnall*, 14 Gratt. (Va.) 369, 374; *Allen v. Watts*, 98 Ala. 384,

money which had been directed to be invested in land for the benefit of A. in fee would, upon A.'s death, descend to her heirs, and that her husband was entitled to an estate by curtesy therein.¹ But, as the widow is not entitled to dower in equitable estates, in the absence of a statute, she could not, until the passage of the Statute 3 and 4 Wm. IV, c. 105, claim her dower in money which was directed to be converted into an estate in lands in fee simple.² Land which is converted by a direction to sell, and to pay the proceeds over to legatees, cannot be sold *as land under lien of an execution obtained against a legatee*, either before or after the actual conversion.³

§ 714. **Dower and curtesy in property converted.**—The English courts of equity very early decided that a husband was entitled to an estate by the curtesy in money directed to be laid out in land prior to the actual conversion. In an early case money was directed to be laid out in land by a father, and settled to the use of his daughter. She married and had a child, but before the land could be purchased she died. The chancellor permitted the husband to have an estate for his life in the money.⁴ This decision was subsequently followed and affirmed in chancery as a well recognized rule.⁵ Although the

11 S. R. 646; *Tazewell v. Smith*, 1 Rand. (Va., 1823), 313; *Pratt v. Taliaferro*, 3 Leigh (Va., 1832), 419. The will of an infant, though it may be valid to carry personal property, is not valid to carry money which has been directed to be laid out in land. *Earlom v. Sanders*, Amb. 241; *Carr v. Ellison*, 2 Bro. C. C. 56. See also § 712, *ante*. The beneficiaries of a devise of land which has been constructively converted into money as of the death of the testator may, in their dealings among themselves, convey it without the formalities which are requisite in conveying land under the statute of frauds. *Howell v. Mellon* (Pa. St., 1898), 42 Atl. R. 6.

¹ *Sweetapple v. Bindon*, 2 Vern. (1705), 536; *Cunningham v. Moody*, 1 Ves. Sr. 174; *Dodson v. Hay*, 8 Bro. C. C. 404.

² See *post*, § 714.

³ *Baker v. Copenbarger*, 15 Ill. 103; *Willing v. Peters*, 7 Pa. St. (1847), 287, 290; *Jones v. Caldwell*, 97 Pa. St. (1881), 43, 46; *Roland v. Miller*, 100 Pa. St. 47, 51; *Hunter v. Anderson*, 152 Pa. St. 386, 390; *Evans' Appeal*, 63 Pa. St. 183, 187; *Paisley v. Holzshu*, 83 Md. 325, 330; *Brolaskey v. Gally*, 51 Pa. St. 509; *Allison v. Wilson*, 13 S. & R. (Pa.) 333; *Morrow v. Brenizer*, 2 Rawle (Pa., 1833), 185; *Stuck v. Mackey*, 4 Watts & S. (Pa., 1842), 496. *Contra*, *Sayles v. Best*, 35 N. E. R. 636, 140 N. Y. 368, construing a statute providing that expectant estates are alienable.

⁴ *Sweetapple v. Bindon*, 2 Vern. 536.

⁵ *Otway v. Hudson*, 2 Vern. 383, 385; *Fletcher v. Ashburner*, 1 Bro. C. C. 497, 498; *Cunningham v. Moody*, 1 Ves. Sr. 174, 176; *Dodson v. Hay*, 8 Bro. C. C. 404; *Ramsden v. Langley*,

general principle that a wife might be endowed of equitable interests was repeatedly recognized, the courts of equity were slow to permit her to enforce her right of dower in money which was to be laid out in land for the benefit of her husband, and which had not actually been converted. No decision is to be found in the English reports in which the wife's right to dower in the money is sustained. On the contrary, it was expressly repudiated by equity in every case where the question arose.¹ At length the matter was settled by statute 3 and 4 William IV, c. 105, which provided that if any husband who died beneficially entitled to any land to the extent that, if it were a legal interest, his wife could claim dower at law, she shall have her dower in his interest. Under this statute, and under similar statutes in the various states of the Union, the widow of the beneficiary of money converted into land is entitled to her dower therein. The converse case, where land is to be constructively converted into money, is clear. As soon as the constructive conversion occurs, the money is free from the dower of the widow of the beneficiary.² So, it may be remarked in conclusion, to further illustrate the statements of the text, that the widow of a person who has entered into an absolute and binding contract to purchase land is entitled to dower therein on the death of her husband, though he has died before the legal title to the land has vested in him by the delivery of the deed.³

§ 715. The failure of the purpose of a conversion — Re-conversion.— Where a testator directs land to be converted by a sale, it will be presumed, in the absence of all proof of a contrary intention, that he intended the conversion solely to carry out his testamentary purpose, and if for any reason that purpose fails, so that the money will not pass under the will,

2 Ves. 536; *Follett v. Tyrer*, 14 Sim. 125.

¹ *Crabtree v. Bramble* (1747), 3 Atk. 680, 687; *Cunningham v. Moody* (1748),

1 Ves. Sr. 174; *Fletcher v. Ashburner* (1779), 1 Bro. C. C. 497; *Park on Dower*, 136; 1 *Roper on Husband and Wife*, 356; *Leigh & Dalziel on Equity Conv.* 62; 1 *Fonbl. Eq.* 420; 1 *Scribner on Dower*, 453.

² *Berrien v. Berrien* (1834), 3 N. J.

Eq. 37; *Cook v. Cook*, 20 N. J. *Eq.* 375; *Willing v. Peters*, 7 Pa. St. 287, 290; *Hunter v. Anderson*, 152 Pa. St. 386, 390.

³ *Robinson v. Miller*, 1 B. Mon. (Ky.) 93; *Reed v. Whitney*, 7 Gray (Mass.), 533; *Lobdell v. Hayes*, 4 Allen (Mass.), 187; *Young v. Young*, 45 N. J. *Eq.* 27; *Church v. Church*, 3 Sandf. Ch. (N. Y.) 434; *Smiley v. Wright*, 2 Ohio, 512.

a constructive reconversion will take place in equity; the proceeds of the land sold will be regarded as land, and the executor or trustee will hold them in trust for the heir of the testator, if it was disposed of in a residuary clause, or for the residuary devisee, if otherwise.¹

¹ *Johnson v. Hilfield*, 82 Ala. 127, 128; *Crerar v. Williams*, 145 Ill. 625, 34 N. E. R. 467; *Haggard v. Rout*, 6 B. Mon. (Ky., 1845), 245, 249; *Wentworth v. Read*, 166 Ill. 139, 46 N. E. R. 777; *Trippe v. Frazier*, 4 Har. & J. (Md., 1819), 446; *Lusk v. Lewis*, 32 Miss. (1856), 297; *Drew v. Wakefield*, 54 Me. 291; *Holland v. Cruft*, 3 Gray (Mass.), 162, 180; *Oberle v. Lerch*, 18 N. J. Eq. 346, aff'd 575; *Smith v. First Church*, 26 N. J. Eq. 132; *Cook v. Cook*, 20 N. J. Eq. 375, 377; *Moore v. Robbins*, 53 N. J. Eq. (1894), 137; *Hand v. Marcy*, 28 N. J. Eq. 59, 65; *Roy v. Monroe*, 20 Atl. R. 481, 47 N. J. Eq. (1890), 356; *Smith v. Kearney*, 2 Barb. Ch. (N. Y.) 533; *Wood v. Keyes*, 8 Paige (N. Y.), 365, 369, 370; *McCarty v. Terry*, 7 Lans. (N. Y.) 236; *Bogert v. Hertell*, 4 Hill (N. Y.), 492, 495, 500; *Jackson v. Jansen*, 6 Johns. (1810), 73, 81; *Hawley v. James*, 5 Paige, 213, 318, 444, 486; *Arnold v. Gilbert*, 5 Barb. (N. Y.) 190, 195; *Giraud v. Giraud*, 58 How. Pr. 175, 182; *Betts v. Betts*, 4 Abb. N. C. (1876), 317, 419; *Gott v. Cook*, 7 Paige (N. Y.), 532, 542; *Marsh v. Wheeler*, 2 Edwards, 156, 159; *Depeyster v. Clendining*, 8 Paige (N. Y.), 295; *Lee v. Tower*, 12 N. Y. S. 240, 56 Hun, 606; *Lindsay v. Pleasants*, 4 Ired. (39 N. C., 1846), Eq. 320, 323; *Procter v. Ferebee*, 1 Ired. Eq. 143, 146; *Wharton v. Shaw*, 3 Watts (Pa., 1834), 124; *Wilson v. Hamilton*, 9 Serg. & R. (Pa., 1823), 424; *Burr v. Sim*, 1 Whart. (Pa.) 252, 262; *Appeal of Wentz*, 17 Atl. R. 875, 126 Pa. St. 541, 24 W. N. C. 291; *In re Worsley's Estate*, 4 Pa. Dist. R. 177, 36 W. N. C. 247; *Monroe v. Jones*, 8 R. L. 526; *North v. Valk*, Dud. (S. C.) Eq. 212; *Dewolf v. Lawson*, 61 Wis. 477, 478 (1884); *Rinehart v. Harrison*, 1 Bald. C. C. 177; *Craig v. Leslie*, 8 Wheat. (16 U. S.) 562, 563, 582; *Collins v. Wakeman*, 2 Ves. Jr. 683; *Williams v. Williams*, 5 L. J. (N. S.) Ch. 84; *Roberts v. Walker*, 1 R. & My. 752; *Amphlett v. Park*, 2 R. & My. 221; *Johnson v. Woods*, 2 Beav. 409; *Shallcross v. Wright*, 12 Beav. 505; *Hopkinson v. Ellis*, 10 Beav. 169; *Gordon v. Atkinson*, 1 De G. & S. 478; *Taylor v. Taylor*, 3 De Gex, M. & G. 190; *City of London v. Garway* (1706), 2 Vern. 571; *Levet v. Needham* (1690), 2 Vern. 138; *Hewitt v. Wright*, 1 Bro. C. C. 86, 90, note; *Robinson v. Taylor*, 2 Bro. C. C. 589, 595; *Ackroyd v. Smithson*, 1 Bro. C. C. 503; *Cruse v. Barley*, 3 P. W. 20; *Yates v. Compton*, 2 P. W. 308; *Starkey v. Brooks*, 1 P. W. 390; *Robinson v. Taylor*, 1 Ves. 44, 2 Bro. C. C. 589; *Collins v. Wakeman*, 2 Ves. Jr. 683, 687; *Eyre v. Marsden*, 2 Keen, 564; *Barley v. Evelyn*, 16 Sim. 290; *Buchanan v. Harrison*, 1 J. & H. 662; *Williams v. Coade*, 10 Ves. 500, 505; *Chitty v. Parks* (1793), 2 Ves. 271, 4 Bro. C. C. 411; *Halliday v. Hudson* (1796), 3 Ves. 210; *Ripley v. Waterworth*, 7 Ves. 425, 435, note; *Marsh v. Smith*, 17 Ves. 29, 32; *Berry v. Usher* (1805), 11 Ves. 87, 91; *Stanley v. Stanley*, 16 Ves. 491; *Watson v. Hayes*, 5 My. & Cr. 125; *Clark v. Franklyn*, 4 K. & J. 257; *Jessopp v. Watson*, 1 My. & K. 665; *Tregonwell v. Sydenham*, 3 Dow, 196; *Salt v. Chattaway*, 3 Beav. 576; *Beotive v. Hodgson*, 10 H. L. C. 656. "Where," said Lord Eldon, in 1813, in *Hill v. Cock*, 1 Ves. & Bea. 173, 175, "a testator means, with regard to a particular purpose, to convert his real estate into personal, if

The principle of reconversion is applied in the case of a sale of land which has been directed for an unlawful purpose; as, for example, where a sale is directed, and the proceeds are to be paid to a charitable institution which is incapable of taking, either because of its own character or because the devise is void by reason of the testator's death occurring within a month after the execution of the will.¹ So, too, where the testator orders his land to be sold and the proceeds to be devoted to a purpose, the execution of which does not exhaust the proceeds, the balance will be constructively reconverted and result to the heir.² So the principle bringing about a constructive reconversion is also applicable with like force to a case in which the testator has directed that lands devised in trust shall be sold and the income of the fund, which is the result of the sale, shall be paid to his widow during her life for her support, but the testator has omitted to dispose of the proceeds of the sale after the death of his widow. He is intestate as to it, though it does not devolve upon the testator's next of kin. Though it has been sold, yet the money is land so far as the heir is concerned, and continues to be regarded as such in equity from the date of the death of the testator.³ Thus, where

that purpose cannot be served, the court will not infer an intention to convert the estate for any other purpose not expressed."

¹In *re Fox*, 63 Barb. (N. Y.) 157, 160; *Burr v. Sim*, 1 Whart. (Pa.) 252, 262; *Read v. Williams*, 26 N. E. R. 730, 125 N. Y. 560; *Appeal of Leffberry*, 17 Atl. R. 447, 125 Pa. St. 513; *Hovey v. Adams* (Mass.), 27 N. E. R. 659; *Attorney-General v. Lord Weymouth*, Amb. 20; *Jones v. Mitchell*, 1 Sim. & St. 294; *Hopkinson v. Ellis*, 10 Beav. 169; *Hamilton v. Foot*, 6 Ir. R. Eq. 572.

²*Moore v. Robbins*, 32 Atl. R. 379, 53 N. J. Eq. 472.

³*Wilson v. Major*, 11 Ves. 205. The rule of a resulting trust in favor of the heir, and a constructive reconversion of land directed to be sold, was first established in the case of *Ackroyd v. Smithson*, 1 Bro. C. C.

508, decided by Lord Chancellor Thurlow in the year 1780. In that case a residue of real and personal property was left in trust for sale and to pay in legacies. Some of the legacies lapsed by the death of the legatees. Prior to that case, if land was sold under an explicit direction for its sale and the purpose of the sale failed, the money resulting from the sale of the land was personal property and went to the next of kin or the residuary legatee. Under the rule laid down in that case, when a conversion of land into money is necessary and a portion of the object fails, the part of the money unexpended is regarded as constructively reconverted unless it is clearly apparent that the intention of the testator was to convert the land out and out.

the testator directed that land should be sold for the support of his widow and family, and it turned out that the personal property was sufficient for the purpose, the proceeds of the land, when sold, went to the heir.¹

§ 716. Resulting trust for the benefit of the next of kin. The rule of resulting trusts is applicable to money which is directed by the testator to be invested in land and the devise fails. Where the purpose of the investment in land fails, whether partially or wholly, a resulting trust will arise in the land itself, if it has been purchased, and it will go as money, not to the heir, but to the next of kin of the testator. Some of the early cases in the English courts of equity favored a distinction between land directed to be sold and money directed to be invested in land, and would permit a resulting trust for the heir in the former on the failure of the testator's purpose, though not for the benefit of the next of kin in the latter; but the distinction was usually expressed as mere *dicta*, and at length it was absolutely repudiated by Lord Cottenham² as a distinction which was not supported by reason, and which, being unjust to the next of kin, would not be permitted to exist. In such case it has been held that, where the will contains a residuary bequest, the money directed to be laid out in land for a purpose which fails or is void shall go to the residuary legatee;³ and where the next of kin become entitled to the land in which the personal property of the testator has been invested, they take it as real estate, and it goes to their heirs or devisees. Their next of kin cannot, after their death, have it constructively reconverted.⁴

§ 716a. The nature of the property in which a reconversion is had for the benefit of the heir.—The question may arise between the heir and the personal representatives of an heir in whose favor a reconversion is had, as to the form in which the property shall devolve upon them, and which of them shall be entitled to it. If, in pursuance of an imperative direction to sell land, an actual sale has taken place, and there

¹Gourley v. Campbell, 66 N. Y. 169, 174, 6 Hun, 218. Eyre v. Marsden, 2 Keen, 564; Hawley v. James, 5 Paige (N. Y.), 318.

²Cogan v. Stevens, 1 Beav. 482, 483, 5 L. J. (N. S.) Ch. 17. ⁴Curteis v. Wormald, 10 L. R. Ch. Div. 172.

³Hereford v. Ravenhill, 5 Beav. 51;

is a *partial* failure of the testamentary purpose to carry out which the sale was necessary, a trust results to the heir in the money arising from the sale of the land which he takes *as money*. His representatives will take the property as it is found on his death. The proceeds of the sale will pass as personal property under his will, and if he shall die intestate they will go to his next of kin.¹ If, however, the sale of no portion of the land becomes necessary by reason of the *total failure* of the purpose for which the conversion was directed, and all the land remains unsold, it will descend to the heir as land, and his heirs and not his next of kin will take it as such. His will passes it under a general or residuary devise of his lands. If the trustees sell where there is an absolute and complete failure of the purposes of the trust, the proceeds of the sale must be constructively reconverted and the money will go to the heir as land.² The distinction lies between a complete and a partial failure of the object which is to be attained by a conversion.

§ 717. **Conflict of laws in relation to equitable conversion.** The court of equity within whose jurisdiction the land in question is located has exclusive power to determine, by construing the will, whether an equitable conversion was intended by the testator. That court is in no wise bound by the judgment of a foreign court which has determined that the land has or has not been converted; but may proceed to decide the question by the laws of its jurisdiction irrespective of what has been elsewhere determined.³

§ 718. **Double conversion defined.**—Double conversion occurs where land is directed to be sold and the proceeds are to be reinvested in other land. The rules and principles governing the subject of equitable conversion, as explained in this chapter, are applicable to a case of this sort. From the time the land is sold until the money which is realized thereby is reinvested in the other land, it will be regarded in equity as

¹ Smith v. Claxton, 4 Madd. 484; Dixon v. Dawson, 2 Sim. & Stu. 327; Jessop v. Watson, 1 My. & K. 665; Wilson v. Coles, 28 Beav. 215; Wall v. Colshead, 2 De Gex & Jo. 683; Attorney-General v. Lomas, L. R. 9 Exch. 29.
² Davenport v. Coltman, 12 Sim. 610; Cooke v. Dealy, 22 Beav. 196. See also Wood v. Skelton, 6 Sim. 176; Buchanan v. Harrison, 1 J. & H. 673.
³ Appeal of Clark, 70 Conn. 195, 483, 39 Atl. R. 155; Ford v. Ford, 80 Mich. 42, 44 N. W. R. 188.

land, and will devolve as such.¹ If the power to sell the land and to reinvest the proceeds is to be exercised only in case there shall be an opportunity to sell at a price named, or to buy particular property, or upon any other contingency, the doctrine of double conversion does not apply.²

§ 719. **Election to take the property unconverted.**—The power of the testator to enforce a new character upon land or personal property by a direction to sell or to invest gives rise to a constructive conversion; but, on the other hand, this constructive conversion may be determined by the person or persons *who actually own absolutely, or are beneficially entitled absolutely, to the property*. The ultimate and absolute owner, if *sui juris*, by electing to take the property in its existing state before it has been actually sold if it was land, or invested in land if personalty, may put an end to the constructive conversion. As equity will do nothing in vain, the court will not compel the trustee to sell or to invest, for the beneficiary who is absolutely entitled may immediately reconvert the property.³

¹ *Sperling v. Toll*, 1 Ves. 70; *Pearson v. Lane*, 17 Ves. 101; *Haggard v. Rout*, 6 B. Mon. 247, 249 (1845); *Ford v. Ford*, 80 Mich. 42, 44 N. W. R. 1057; *Dewolf v. Lawson*, 61 Wis. 477, 478.

² *Ford v. Ford*, 80 Mich. 42, 44 N. W. R. 1057. The proceeds of land which has been sold, and which are awaiting reinvestment in land, will not pass under a devise of all the testator's land where a part only of the lands has been sold, but the land which has *not* been sold will pass. *In re Pedder*, 5 D. M. & G. 890.

³ *In re Cotton's Trust*, L. R. 19 Ch. D. 624, 628; *Cropley v. Cooper*, 7 D. C. 226; affirmed, 19 Wall. (U. S.) 167; *Broome v. Curry*, 19 Ala. 805 (1851); *De Vaughan v. McLeroy*, 82 Ga. 687, 10 S. E. R. 211; *Mandlebaum v. McDonnell*, 29 Mich. (1874), 78, 87; *People v. Lease*, 71 Ill. App. 380, 393; *Gest v. Flock*, 2 N. J. Eq. (1838), 21; *Huber v. Donoghue*, 49 N. J. Eq. 125, 23 Atl. R. 495; *Reed v. Underhill*, 12 Barb. (N. Y.) 113; *Quin v. Skinner*, 49 Barb. (N. Y., 1867), 132; *Armstrong*

v. McKelvey, 104 N. Y. 179; *Tazewell v. Smith*, 1 Rand. (Va.) 313 (1823); *Laird's Appeal*, 85 Pa. St. 329; *Ross v. Drake*, 37 Pa. St. 373; *In re Cunningham*, 20 Atl. R. 714, 137 Pa. St. 621, 27 W. N. C. 65; *Battersby v. Castor*, 37 Atl. R. 572, 181 Pa. St. 555; *Kirkman v. Miles*, 13 Ves. 338. The power of sale is forever terminated by the election of the beneficiaries to take the land as land. *McDonald v. O'Hara*, 34 N. Y. S. 692, 13 Misc. R. 527; *Smith v. Farmer Type Co.*, 17 Misc. R. 311, 41 N. Y. S. 788, 40 N. Y. S. 856. "The principle upon which the whole of this doctrine is founded is, that a court of equity, regarding the substance and not the mere forms and circumstances of agreements and other instruments, considers things directed or agreed to be done as having been actually performed, where nothing has intervened which ought to prevent a performance. This qualification of the more concise and general rule that equity considers that to be done which is

§ 720. Who may elect to take the property unconverted. The person who is to take property unconverted must be *sui juris*.¹ An infant cannot elect unless upon due judicial inquiry and under the direction of the court, and only when it is ascertained that an election will be for his benefit.² Neither can a lunatic himself elect, nor his committee elect for him.³ In the absence of an enabling statute, a married woman was clearly incompetent to elect by deed to take land or money unconverted.⁴ But by coming in equity and being properly examined, the court of equity had power to elect for her in respect to the property settled to her separate use. But this

agreed to be done will comprehend the cases which come under this head of equity." "Thus, where the whole beneficial interest in the money in the one case, or in the land in the other, belongs to the person for whose use it is given, a court of equity will not compel the trustee to execute the trust against the wishes of the *cestui que trust*, but will permit him to take the money or the land, if he elect to do so, before the conversion has actually been made; and this election he may make as well by acts or declarations, clearly indicating a determination to that effect, as by application to a court of equity. It is this election, and not the mere right to make it, which changes the character of the estate so as to make it real or personal, at the will of the person entitled to the beneficial interest. If this election is not made in time to stamp the property with a character different from that which the will or other instrument gives it, the latter accompanies it, with all its legal consequences, into the hands of those entitled to it in that character. So that in case of the death of the *cestui que trust* without having determined his election, the property will pass to his heirs, in the same manner as it would have done had the trust been

executed and the conversion actually made in his life-time." By the court in *Craig v. Leslie*, 3 Wheat. (16 U. S.) 563, on page 578, by Washington, J.

¹ *Craig v. Leslie*, 3 Wheat. (16 U. S.) 563, 578; *Beadle v. Beadle*, 3 McCrary, C. C. (U. S., 1881), 586; *Emens v. St. John*, 79 Hun, 101; *Fluke v. Fluke*, 16 N. J. Eq. (1863), 478, 481; *Osgood v. Franklin*, 2 John. Ch. (N. Y.) 21; *Reed v. Underhill*, 13 Barb. (N. Y.) 113; *Hetzel v. Barber*, 69 N. Y. 1, 14; *Holt v. Lamb*, 17 Ohio St. (1867), 374; *Story, Eq.*, § 793; *Turner v. Davidson*, 80 Va. 841, 849.

² *Carr v. Branch*, 85 Va. 597 (1889), 8 S. E. R. 476; *Hetzel v. Barber*, *supra*; *Burr v. Sim*, 1 Whart. (Pa.) 252, 263; *Carr v. Ellison* (1785), 2 Bro. C. C. 56, 2 Dick. 796; *In re Harrop*, 3 Drew. 726, 734; *Van v. Barnett*, 19 Ves. 102; *Robinson v. Robinson*, 19 Beav. 494, 496.

³ *In re Wharton*, 5 De Gex, M. & J. 33; *In re Barber*, L. R. 17 Ch. Div. 241; *Ashby v. Palmer*, 1 Mer. 296.

⁴ *Cunningham v. Moody*, 1 Ves. 174; *Sharp v. St. Sauveur*, L. R. 7 Ch. App. 343; *In re Davidson*, L. R. 11 Ch. D. 341; *Oldham v. Hughes*, 2 Atk. 452, 453; *Frank v. Frank*, 3 My. & Cr. 171; *Forbes v. Adams*, 9 Sim. 462; *Spencer v. Harrison*, L. R. 5 Com. Pl. Div. 97.

election was not by deed, but by a decree of the court.¹ But now, both in England and in the United States, by virtue of the statutes conferring the power upon a married woman to control the disposition of her property, real or personal, she may elect by deed.²

§ 721. All persons at interest must concur in electing.—Where land is notionally converted by a direction to sell and to divide the proceeds among several persons, there can be no election to take the land as such unless all agree. Some cannot take the land as land, and others have a portion sold and the money paid to them; for to permit this would inevitably result in depreciating the value of the land to be sold, and in reducing the shares of those who elect to take in money.³ These objections do not apply in the case of money given to be invested in land for several persons as tenants in common, and any one of the legatees may take his share in money without the concurrence of the others; for the balance of the fund may

¹Oldham v. Hughes, 2 Atk. (1742), 452, 453; In re Davidson, 11 Ch. Div. 341; Pratt v. Taliaferro (1832), 3 Leigh (Va.), 419, 424; McClanachan v. Siter, 2 Gratt. (Va.) 280; Turner v. Dawson, 80 Va. 841, 849. Cf. Walker v. Denne, 2 Ves. Jr. 170, 182.

²Briggs v. Chamberlain, 11 Hare (1853), 69; May v. Roper, 4 Sim. 360; Forbes v. Adams, 9 Sim. 462; Bowyer v. Woodman, L. R. 3 Eq. 313; Baker v. Copenbarger, 15 Ill. 103, 105; Rice v. Baxter, 1 Watts & Serg. (Pa.) 455.

³Rinehart v. Harrison, 1 Bald. C. C. (U. S., 1830), 177, 186; Craig v. Leslie, 3 Wheat. (16 U. S.) 577, 585; High v. Worley, 33 Ala. (1858), 196, 199; Swann v. Garrett, 71 Ga. 566, 569, 570; De Vaughn v. McLeroy, 82 Ga. 687, 695 (1889); Helset v. Helset, 8 Ill. App. 22; Baker v. Copenbarger, 15 Ill. (1853), 103, 105; Baldwin v. Vreeland, 43 N. J. Eq. 446; Fluke v. Fluke, 16 N. J. Eq. 478; Emens v. St. John, 79 Hun (N. Y.), 99; Mellen v. Mellen, 139 N. Y. 210, 34 N. E. R. 925; McDonald v. O'Hara, 144 N. Y. 566; Beatty v. Byers, 18 Pa. St. (1851), 107; Evans'

Appeal, 63 Pa. St. (1869), 183, 187; Willing v. Peters, 7 Pa. St. 287, 290; Harcum v. Hudnall, 14 Gratt. (Va., 1858), 369, 375; Brown v. Miller (W. Va., 1898), 31 S. E. R. 956; Ford v. Ford, 5 Am. St. R. 147; Brown v. Brown, 33 Beav. 399; Biggs v. Peacock, L. R. 22 Ch. D. 284; Deeth v. Hale, 2 Moll. 317; Smith v. Claxton, 4 Madd. 484, 494; Trower v. Knightley, 6 Mad. 134; Holloway v. Radcliffe, 23 Beav. 163, 171; In re Davidson, L. R. 11 Ch. D. 341, 348; Sisson v. Giles, 3 D. J. & S. 614; Briggs v. Chamberlain, 11 Hare, 69; Frank v. Bollans, 3 Ch. App. 717; Bowyer v. Woodman, L. R. 3 Eq. 313. Since all the beneficiaries must join in electing to take the land instead of the money, a sale of land, which was directed to be sold as soon as practicable and the proceeds divided, will not be enjoined on the application of one of them merely because of the dullness of the real estate market. McDonald v. O'Hara, 30 N. Y. S. 545, 9 Misc. R. 686, 39 N. E. R. 642, 144 N. Y. 566. See also cases cited *ante*, § 719.

be invested in land as advantageously as the whole fund, and, said Lord Cooper, "it is in vain to lay out this money in land for one, when the next moment he may turn it into money; and equity, it is said, like nature, will do nothing in vain."¹

§ 722. When an election must be made.—The person who has a right to elect must exercise his right *before the actual sale* has been made. He cannot, after land has been sold and turned into money, constructively reconvert it into land, where his action will prejudice others. Thus a judgment creditor, who is also a legatee of a portion of the proceeds of land directed to be sold, cannot, after it has been sold, enforce the lien of his judgment upon the share of another legatee as land;² and where a legatee, who has a right to elect, has elected to take land instead of money, the executors and trustees under *his* will cannot elect to reconvert the land into money.³

§ 723. What acts constitute an election to take property unconverted.—The evidence of an election on the part of persons entitled to property to take it in an uncontroverted condition must be clear, satisfactory and unequivocal. Election depends on intention, and the proof must leave no doubt of the intention.⁴ An express declaration of an intention to elect, made by parol, is sufficient.⁵ Devising land directed to be sold in language which can only be applicable to the disposition of real property by will,⁶ giving a mortgage on it,⁷ paying off charges on it,⁸ selling it and giving a deed for it as land,⁹ leasing it to a new tenant from year to year¹⁰ for a num-

¹ Seeley v. Jago, 1 P. Wms. 389; Walker v. Denne, 2 Ves. Jr. 170, 182; High v. Worley, 33 Ala. 196.

² Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 1; Allison v. Wilson, 18 Serg. & R. (Pa.) 330; Reed v. Mellor, 122 Pa. St. 635, 652.

³ Howell v. Craft (N. J. Eq.), 27 Atl. R. 485.

⁴ Bailey v. Alleghaney Bank, 104 Pa. St. (1883), 425; Evans' Appeal, 63 id. (1869), 183, 187; Jones v. Caldwell, 97 id. 442; Hall v. Hall, 2 McCord (S. C., 1827), Eq. 269, 306; Stead v. Newdigate, 2 Mer. 531; Harcum v. Hudnall, 14 Gratt. (Va.) 369, 375; Willing v. Peters, 7 Pa. St. 287.

⁵ Wheldale v. Partridge, 8 Ves. 227,

236; Pulteney v. Lord Darlington, 1 Bro. P. C. 530; Edwards v. Countess of Warwick, 2 P. Wms. (1763), 173, 174, 2 Eq. Cas. Ab. 42; Dixon v. Gayfere, 17 Beav. 433.

⁶ Meek v. Devenish, L. R. 6 Ch. D. 566, 573, 578; Sharp v. St. Sauveur, L. R. 7 Ch. App. 343.

⁷ Gest v. Flock, 2 N. J. Eq. (1838), 108, 115.

⁸ Caston v. Caston, 2 Rich. (S. C.) Eq. 1; Fulton v. Moore, 25 Pa. St. 468; Clay v. Hart, 7 Dana, 1.

⁹ Emens v. St. John, 79 Hun, 101; Major's Estate, 11 Pa. Co. Ct. R. 359; Prentice v. Jansen, 79 N. Y. 478, 485.

¹⁰ In re Gordon, L. R. 6 Ch. D. 531, 537, 538.

ber of years by a lease binding upon the heirs of the lessor,¹ an actual partition of the land,² filing a bill asking for its sale,³ taking possession of it and occupying it,⁴ or taking the title deeds into possession⁵ where their possession is necessary to a sale, is strong and usually conclusive evidence of an election to take as land. If occupation is accompanied by circumstances indicating an intention to enjoy the property permanently as land, as erecting buildings or otherwise improving it,⁶ the presumption would be conclusive. But possession of and leasing the lands are always to be considered in connection with all the circumstances. A short possession by tenants in common leasing and receiving rents⁷ is inconclusive, though where it appeared that one of them wished to retain his share as land, and the other acquiesced, the court held that both had elected to take the land.⁸

The act of a person who is absolutely entitled to money which has been directed or agreed to be laid out in land, in *receiving the money from the trustees in its original shape*, is conclusive of an intention to take it as money,⁹ though his receipt and expenditure of the income pending an investment are not an indication of such an intention.¹⁰ So, also, it has been held that the intention to elect to take money which has been directed to be laid out in land is conclusively shown by *bequeathing the money as personal property*,¹¹ or by the execution of a deed by and among the persons who are absolutely entitled, *describing it as money which they are entitled to receive*,¹² or by the parties calling for a re-investment of the money in new

¹ *Mutlow v. Biggs*, L. R. 1 Ch. D. 383, 385, 393. Ves. 338; *Brown v. Brown*, 33 Beav. 399.

² *Scudder v. Stout*, 10 N. J. Eq. 377.

³ *Huber v. Donoghue*, 49 N. J. Eq. 125, 23 Atl. R. 125.

⁴ *In re Gordon*, L. R. 6 Ch. Div. 531, 538; *Crabtree v. Bramble*, 3 Atk. 680; *Armstrong v. McKelvey*, 104 N. Y. 179.

⁵ *Griesbach v. Fremantle*, 17 Beav. 314; *Davies v. Ashford*, 15 Sim. (1845), 447.

⁶ *Mutlow v. Biggs*, *supra*.

⁷ *Mellen v. Mellen*, 139 N. Y. 210, 34 N. E. R. 925; *Kirkman v. Miles*, 13

⁸ *In re Davidson*, L. R. 11 Ch. D. 341, 352.

⁹ *Pulteney v. Lord Darlington*, 1 Bro. C. C. 235, 236, 238; *Trafford v. Boehm*, 3 Atk. 440.

¹⁰ *Gillies v. Longlands*, 4 De Gex & Smale, 372; *Pedder's Settlement*, 5 De Gex, Mac. & G. 890.

¹¹ *Pulteney v. Lord Darlington*, 1 Bro. C. C. 235, 236.

¹² *Cookson v. Reay*, 5 Beav. 22; *Biddulph v. Biddulph*, 12 Ves. 161, 166.

securities of a personal character,¹ or by one of them including it in an inventory of his personal estate as such.² And when the devisees of land directed to be sold have elected to take it unconverted, it is land for all purposes; and if, disregarding the election, the land is sold, equity will nevertheless consider the money resulting from the sale as land, and it will descend as land to the heir.³ Where there is imminent danger of the trustees disregarding the election of beneficiaries to take the property unconverted, equity will by an injunction restrain the sale of the land or the investment of the money.⁴ And finally, all parties being *sui juris* and agreeing to take the land unconverted, it is most safely done by all joining in an application to a court of equity for a decree declaring the trust terminated, instructing the trustees to make proper conveyances, and authorizing a partition according to the terms of the will.

§ 724. Election by remaindermen to take land unconverted.—A remainderman may elect to take land unconverted during the life of the tenant for life, where the power of sale is to be exercised at the death of the latter. The cases in which such an election has been made are where the remainder was vested,⁵ and the general rule is that no one can elect to take property unconverted unless he is absolutely entitled.⁶ But there seems to be no good reason why a person who is only contingently entitled may not elect, pending the life estate, and when the event shall happen on which he becomes absolutely entitled, this election shall operate; while if the event never happens, his election, being unnecessary, shall fall with it.⁷ The remainderman may elect after the death of the life

¹ *Lingen v. Sowray*, 1 P. W. 172.

² *Harcourt v. Seymour*, 2 Sim. (N. S.) 12, 47. Compare *Skegg's Settlement*, 2 De Gex & Smale, 533, 535.

³ *In re Gardner's Trust*, L. R. 1 Eq. 57; *Mutlow v. Biggs*, L. R. 1 Ch. D. 383, 385.

⁴ *Meek v. Devenish*, L. R. 6 Ch. D. 571.

⁵ *Short v. Wood*, 1 P. Wms. (1718), 470, 471; *Crabtree v. Bramble*, 3 Atk. 680; *Roberts v. Gordon*, 37 L. J. (N. S.) 627; *Meredith v. Vick*, 23 Beav. 559;

Harcourt v. Seymour, 15 Jur. 740; *In re Stewart*, 16 Jur. 1063; *Darnford v. Darnford*, 10 L. J. (N. S., 1841), Ch. 341, 342; *Meek v. Devenish*, L. R. 6 Ch. Div. 566; *Howell v. Tompkins*, 42 N. J. Eq. 305, 11 Atl. R. 333; *Devon v. McLeroy*, 82 Ga. 687, 695; *Harper v. Bank*, 17 Misc. R. 228.

⁶ *Sisson v. Giles*, 32 L. J. (N. S.) Ch. 606, 3 De Gex, J. & S. 614.

⁷ *Meek v. Devenish*, L. R. 6 Ch. Div. 559, 566, 571, 573.

tenant and before actual conversion;¹ but he cannot wait until after the sale, and by an election to take the proceeds as land prejudice the rights of others. It is obvious that the election of a remainderman who has no right to an actual possession, or even to a receipt of income, during the prior estate, cannot be evidenced by the same acts as in the case of an estate vested in possession; proof of a direction on his part to the trustee not to sell,² or a conveyance by him of his future interest, in language solely applicable to land, is the usual mode of election.

§ 725. When the tenant in tail may elect.—The English cases are not wholly harmonious upon the power of a tenant in tail of money directed to be laid out in land to elect to take it unconverted. It depends upon the character of his interest. If he, being himself *sui juris*, could by a fine bar the entail and acquire an absolute interest, he may elect to take the money unconverted, otherwise not. He may levy the fine if he is tenant in tail with remainder to himself in fee simple; but if the remainder is in some other person, that person must join in a recovery, and the tenant in tail cannot elect without his consent.³

§ 725a. No constructive conversion when money is at home. The English cases refuse to countenance any constructive conversion of money directed or agreed to be laid out in land where the money to which the direction or agreement was applicable *is at home*. This peculiar expression may be thus explained. Where the obligation to invest the money in land and the right to call for its investment unite in the same person, the money is said to be at home; and, as the necessity for a conversion is past, none will be construed to have taken place as regards the heirs or next of kin of the person in whose hands the money is at home. Thus, where a man agrees to invest money in land to be settled on his son for life, remainder to the son's children, remainder to himself and his heirs, and the son dies without issue before the money is actually invested,

¹ De Vaughn v. McLeroy, 82 Ga. 687, 695.

² Meredith v. Vick, 23 Beav. 559, 565, 567.

³ Collet v. Collet (1737), 1 Atk. 11; Trafford v. Boehm, 3 Atk. 440, 447;

Warwick v. Edwards, 1 Bro. P. C. 207, 2 P. W. 173; Dornford v. Dornford, 10 L. J. (N. S.) Ch. 341, 342; Benson v. Benson, 1 P. W. 130, 131; Short v. Wood, 1 P. W. 470, 471; Amler v. Amler, 3 Ves. Jr. 585.

so that the money remains in the hands of the person who agreed to make a settlement, no constructive conversion takes place, and the money is money as between the representatives of the settlor. If he dies, the money agreed to be invested will pass as personal property to his executor. The general tendency of the English decisions is to hold that the heirs of the person agreeing to make the settlement have no equity to claim the money as land against the executor or next of kin of the ancestor, though if he had actually carried out the agreement, and had invested the money as he had covenanted to do, they would have inherited it from him as land actually purchased under the agreement to make a settlement upon his son and the issue of the marriage.

The principles upon which the doctrine of the money being at home is based are similar to those elsewhere explained,¹ by virtue of which a person in whom the beneficial interest is absolutely vested may, if he be *sui juris*, elect to take the money or land unconverted. The person in whose hands the money is at home may elect to invest it in land, and if he does so his heirs will take it as such; but if he elect to retain it without an actual conversion into land, no constructive conversion will be made in favor of his heirs, for as soon as the money is in his hand it is free from the terms of the trust. He is the absolute owner of it, though it is money, as he would also be if it had been invested in land. In the latter case he might alienate it and alter it into money, for he has the absolute right to it in either form.²

¹ § 719.

² See *Chichester v. Bickerstaffe*, 2 Vern. 295; *Pulteney v. Darlington*, 1 Bro. C. C. 223; *Edwards v. Countess of Warwick*, 2 P. Wms. 176; *Scuda-*

more v. Scudamore, Pre. Ch. 544; *Bowes v. Earl of Shrewsbury*, 5 Bro. P. C. 144; *Rich v. Whitfield*, L. R. 2 Eq. 583.

CHAPTER XXXVII.

THE DOCTRINE OF EQUITABLE ELECTION AS RELATING TO WILLS.

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| <p>§ 726. Definition and general doctrine of election.</p> <p>727. The origin of the doctrine of election.</p> <p>728. The foundation of the doctrine of election.</p> <p>729. The effect of the election—Whether based on compensation or forfeiture.</p> <p>730. Presumption against the necessity for an election—The testator must intend to dispose of the property of another.</p> <p>731. Finality of an election—Its revocation when made by mistake or procured by fraud or bad faith.</p> <p>732. A case for an election does not arise where the will is invalid.</p> <p>733. A party taking title indirectly is not put to his election by a gift under the will.</p> <p>733a. The period within which the election must be made.</p> <p>734. Whether parol evidence is receivable to show an intention to require an election.</p> <p>735. What acts constitute an election to take under the will.</p> <p>736. Not material that the testator supposes he owns the property devised.</p> <p>737. Election by infants and incompetent persons.</p> <p>738. The doctrine of election in relation to the claims of creditors.</p> | <p>§ 739. Election between gifts by the same will.</p> <p>740. Election in the case of a will devising land in different states.</p> <p>741. Cases of election under powers of appointment.</p> <p>742. Election among tenants in common, and between the life tenant and remaindermen.</p> <p>743. The right of election does not inure to heir.</p> <p>744. The doctrine of election in its application to dower.</p> <p>745. A general devise of land to the widow or a devise of land in trust to sell does not bar dower.</p> <p>746. Presumption of an election by the widow from an equality of division.</p> <p>747. The effect of an election by the widow to take under the will.</p> <p>748. Compensation to widow when devise taken in lieu of dower fails.</p> <p>749. Statutory provisions regulating the widow's election.</p> <p>750. Election in relation to devises of community property.</p> <p>751. Election in the case of a devise of the homestead.</p> <p>752. Election in the case of a bequest of the proceeds of a policy of insurance.</p> <p>753. The husband's right to elect as respects his curtesy.</p> <p>754. Curtesy in land in separate-use trust.</p> |
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§ 726. **Definition and general doctrine of election.**— Election has been very neatly defined by Mr. Story as “The obligation imposed upon a party to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both.”¹ The doctrine of election is of comparatively recent origin in equity, and is applicable both to wills and to deeds: It is proposed in this chapter to discuss the subject only so far as it is applicable to wills. Whether the true foundation of the doctrine be the intention of the testator, actual or presumed, that the party shall not take inconsistent benefits, or whether its foundation be the equitable principle that “he who seeks equity must do equity,”² is not very important; for the doctrine itself is so reasonable, and it commends itself so forcibly to one’s sense of justice, that it is sure to find a place in any well-regulated system of jurisprudence.

The doctrine of election as applied to the law of wills simply means that he who takes under a will must conform to *all* its provisions. He cannot accept a benefit given by the testamentary instrument and evade its burdens. He must either conform to the will or wholly reject and repudiate it. No person is under any legal obligation to accept the bounty of the testator; but, if he accepts what the testator confers upon him by his will, he must adhere to that will throughout all its dispositions. If he shall take a beneficial interest in the estate under the will, equity will hold him to his choice, and it will be conclusively presumed that he intends thereby to ratify and conform to every part of it. This presumption of a ratification of the will on his part is applicable though the testator has attempted to give away property belonging to him. He cannot accept the instrument so far as it benefits him and reject it so far as it gives away his property, for it is against equity and good conscience that a person should hold property given or devised by virtue of the will which he could not do without it, and at the same time defeat some of its provisions by asserting his paramount claim to that which, by the will, was intended to benefit others. He must therefore either

¹ Story, Eq. Jur., § 1075.

² See *post*, § 729.

wholly comply with the will or wholly repudiate it and adhere to his paramount claim.¹

§ 727. **The origin of the doctrine of election.**—It is undoubtedly true, as pointed out by the authorities, that the doctrine of election had its origin in the Roman law. In that system of jurisprudence a person by his testament appointed an heir, who was simply the successor of the testator. The person thus appointed had a period of time granted him to enable him to determine whether he would accept the nomination as *heres*. If he accepted, in other words, if he elected to take under the *testamentum*, he was bound to fulfill all its provisions, to pay the debts of the testator and the legacies given in the will. So, too, according to the rules of the Roman law, the testator might not only give his own property as a legacy, but he might also give the property of the person whom he appointed as heir, or he might give the property of a third person. Thus he might by his testament give a house to A. which belonged to B., and the heir, electing to take the succession, was bound by his election either to purchase the house from B. and to convey it to A., or to give A. the full value of the house in money. But this rule of the Roman law was only applicable where the testator, in giving the property of another as a legacy, *knew* that he was bequeathing property which did not belong to him; for, if he gave away the property of another person under the belief that it was his own, the gift was void.

¹ *Morrison v. Bowman*, 29 Cal. (1865), 347; *Kinsey v. Woodward*, 8 Harr. (Del.) 454, 466; *Madison v. Larmmon* (Ill., 1895), 48 N. E. R. 556; *Lessley v. Lessley*, 44 Ill. (1867), 527, 529; *Wilbanks v. Wilbanks*, 18 Ill. 17, 19; *Haydon v. Ewing*, 1 B. Mon. (40 Ky., 1841), 111, 114; *George v. Bussing*, 15 id. 558, 563, 565; *Gore v. Stevens*, 1 Dana (31 Ky.), 201, 204; *Smart v. Easley*, 5 J. J. Marsh. (Ky.) 215, 216; *Ward v. Ward*, 15 Pick. (32 Mass., 1834), 511, 526; *Smith v. Smith*, 14 Gray (Mass.), 532, 533; *Hyde v. Baldwin*, 17 Pick. (Mass., 1835), 303, 308; *Hapgood v. Houghton*, 23 Pick. (Mass.) 480; *Smith v. Guild*, 34 Me. (1852), 443, 447; *Leonard v. Cromme-*

lin, 1 Edw. (N. Y.) 206; *Stevenson v. Brown*, 4 N. J. Eq. 503, 504; *Kinnaird v. Williams*, 8 Leigh (Va., 1836), 400, 406. "A valid gift, in terms absolute, is qualified by reference to a distinct clause, which, though inoperative as a conveyance, affords authentic evidence of intention. The intention being assumed, the conscience of the donee is affected by the condition (although it is destitute of legal validity), not express, but implied, which is annexed to the benefit proposed to him. For the donee to accept the benefit while he declines the burden is to defraud the design of the donor." 2 Story, Eq. Jur., § 1077.

This, as will be seen, is the opposite of the rule of English equity, where the doctrine of election is applicable irrespective of the fact that the testator erroneously supposed that he owned the article which he has disposed of.¹

§ 728. **The foundation of the doctrine of election.**—The cases in which the doctrine of election was created, and in which the rules that govern it were formulated, proceeded upon the theory of a presumptive intention upon the part of the testator, or the donor, that the person *was not to take a double benefit*. The courts reasoned that if a man, by his will, gave property of his own to A., and by the same will gave property

¹ Justinian's Institutes, lib. II, tit. XX, sec. 4. The doctrines of equity, unlike the rules of the common law, may readily be traced to their origin. We are able to say with absolute certainty when and by what chancellor almost every principle of equity jurisprudence had its origin. The rule of the common law that land should descend to the eldest son as heir must have had its origin at some particular point of time. There must have been some adjudication in which that fundamental rule of the common law was formulated for the first time, though it is absolutely impossible at the present time to ascertain when or how the rule arose. But with equity the case is quite otherwise. We can, for example, point to the case of *Noys v. Mordaunt*, reported 2 Vernon, 581; Eq. Ca. Ab. 273, pl. 3; Prec. Ch. 265, and decided by Lord Chancellor Thurlow, in the year 1706, as the occasion for the creation of the equitable doctrine of election. In that case a man having two daughters made a will in 1686 in which he devised to one of them (B.) lands which he owned in fee simple, and to the other (C.) lands which had been settled upon him in fee tail, as follows: "To the testator for life, then to his wife for life as jointure, then to the sons of the testator on their majority in order of birth, and in default of male issue,

then to the heirs of the body." The daughter (B.) to whom the fee-simple lands had been devised claimed a share in the settled lands as one of the heirs of the body, there being no sons of the marriage. She claimed to take a moiety of the lands in fee tail, all of which had been devised to C. The court, in rejecting her claim, remarked that in all cases where a man, disposing of lands among his children, gives to one fee-simple lands, and to another lands entailed upon the one to whom the fee-simple lands are given, or upon such one jointly with the other, it is upon an implied condition that each party acquit and release the other, particularly where the intention of the testator is evidently to dispose of his whole estate. This case was soon followed by *Hearne v. Hearne*, 3 Vern. 55, and *Cowper v. Cotton*, 3 P. Wms. 123, decided in 1731, where, in the case of a freeman of London, devising his estate to raise a fund for his daughters, it was held that they must choose between what they would take under the will and what they take by the custom of London. A few years later in 1735 in *Streatfield v. Streatfield*, Cas. Temp. Talbot, 176, the whole matter was re-examined by Lord Chancellor Talbot and the principle of election affirmed and restated with great particularity.

which belonged to A. to B., he was presumed to intend that A. should not claim the property given him under the will and also assert his right to his own property given to B., and the court of equity implied a tacit condition to that effect, which was supposed to be annexed to the gift to A. The court implied an intention, or created a presumption of an intention, that the person should elect, where the actual intention was not ascertainable from the language of the will. For, if the testator *knew* that the property which he attempted in his will to give away *belonged to some person other than himself*, it is extremely reasonable to presume an intention on his part that the devisee should elect. For, if he gives away property which he *knows* belongs to some other person, and at the same time gives that person something under his will, he must have relied upon the benefits that he conferred upon the latter to induce him to relinquish his property given to some one else. Under such circumstances an intention to require an election may reasonably be presumed.

But where a testator *supposes* the property of the third person which he gives away is in fact his own, any presumption of an intention to put such person to an election is merely a fiction of law, as the testator *undoubtedly believes he is disposing of his own property*. Although the cases almost unanimously base the doctrine of election upon an intention on the part of the testator, it is clear that the rule of election in the latter case stands upon a different basis. The doctrine of election is not arbitrary and unreasonable, nor is it based on technical grounds. It is designed to carry into effect the intention of the testator, which must in every case be ascertained from the will. Evidence outside of the will is not admissible to show an intention on the part of the testator that the party should elect. And where the will shows no intention either way, it does not seem necessary to resort to any fiction of the existence of a presumed intention, for equity jurisprudence furnishes a principle which solves the difficulty, and, by placing the doctrine of election on its true foundation, relieves it of its seemingly technical and arbitrary character. The principle of equity, *that he who seeks equity must do equity*, is the true basis of the doctrine of election. If a party comes into a court of equity claiming an interest in property under an instrument by which

other property belonging to him is given to another, he must abide by the whole instrument. He *must do equity*, to the extent of acquiescing in the provisions of the instrument so far as they are adverse to his interests, before asserting his rights under the instrument, to the extent that it benefits him. In other words, while seeking to defend and advance his own interests under the instrument, he must respect the rights which it confers upon other.¹ But generally the mere receipt of a legacy will not preclude a legatee from claiming land adverse to the will, in the absence of a counter equity, though the claimant, before enforcing his right, must repay the legacy, with interest, or bring it into court. This is the rule though he is an infant, and the election must be made for him.²

And a court of equity will adapt the remedy to the particular circumstances of each case. For if a person who elects to take against a will has received a legacy under it which he is unable or unwilling to repay, a court of equity will decree that the legacy shall be a lien upon the property which he takes against the will in favor of the executor if it be personal property, and in favor of the disappointed devisee if it be real property.³

§ 729. The effect of the election and whether based on compensation or forfeiture.—Upon common-law principles

¹“You cannot act, you cannot come forth to a court of justice claiming any repugnant rights. When you claim under a deed, you must claim under the whole deed together. You cannot take one clause and desire the court to shut their eyes against the rest. Suppose in the will a legacy is given to you by one clause; by another an estate of which you are in possession is given to another; while you hold *that* you shall not claim the legacy. You cannot dispute the ownership. So in the case of personal legacies. If the specific thing failing, and one of the legatees is by the will given another, the legatee cannot hold both. He must make himself competent to take the legacy by giving up the specific thing.” *Wilson v. Lord Townshend*, 2 Ves. Jr. 697, by Lord Rosslyn.

²*Hamblett v. Hamblett*, 6 N. H. 333, 337; *Young v. Young*, 51 N. J. Eq. 491, 27 Atl. R. 627; *Bell v. Armstrong*, 1 Add. 365, 374; *Braham v. Burchell*, 3 Add. 243, 257.

³*Codrington v. Lindsay*, L. R. 8 Ch. App. 578. The doctrine of election has been applied to the case of a devisee who, being *also an executor*, got possession of the personal property, and misappropriated it to the prejudice of legatees; having thus disappointed the intention of the testator who had divided the personal estate equally among all his children, it was decreed that he should forfeit his right to a share in the land to make good what he had taken more than his share in the personal property. *Armstrong v. Walker*, 25 Atl. R. 53, 150 Pa. St. 589.

the party who has elected to take against a will, that is to say, who has elected to take property which belongs to him, but which the testator has devised to another, and to relinquish property which belonged absolutely to the testator, but which had been by the testator given to him, would by his action not only deprive that other of the property which the testator had given him, but the property which he relinquished would go as property of which the testator was intestate, or would pass as a part of the residue. In other words, he forfeited his title to the property given him by the will, *not for the benefit of the other legatee whom he had disappointed* by his election, but for the *benefit of the heirs or next of kin of the testator*. And the result of this would be, if equity had not, in formulating the doctrine of election, provided for such a contingency, that the testator, who it may be presumed intended to die testate, would have his intention nullified so that his heir whom he had disinherited by express words would take the estate.

In equity the rule is quite different. The common-law principle of forfeiture is not recognized. The person who makes an election against the will must surrender that which is given to him by the will in order to make good that which he takes from another beneficiary. The equitable rule of compensation is recognized that the intention of the testator, so far as is possible, may be carried out. The person electing is not divested of the legal title to the property devised him, but he holds it as a trustee for those whom his election disappoints. And equity will sequester and administer the property he renounces for the purpose of compensating those who have been deprived of what the will was made for the purpose of giving them.¹

¹ Jennings v. Jennings, 21 Ohio St. 81; Pennsylvania Co. v. Stokes, 61 Pa. St. 136; Sandoe's Appeal, 65 Pa. St. 314; Small v. Marbury, 77 Md. 11, 25 Atl. R. 920; Brandenburgh v. Thorndike, 28 N. E. R. 575, 139 Mass. 102; In re Ballentine's Estate, 25 Pittsb. Leg. J. 416; Lilly v. Menke, 126 Mo. 190, 28 S. W. R. 643; Collins v. Collins, 126 Ind. 559, 25 N. E. R. 704. The testator devised land to A., B. and C., a portion of which he had previously conveyed to A. The devisees were to take equally. A. was required to elect whether he would take under the will or claim what he had been given by the deed. Having elected to retain the land under the deed, *he could not ask for a partition of the remainder*, but the share which he would have received therein had he taken under the will would be sequestered to compensate B. and C. Brown v. Brown, 43 Minn. 270, 44 N. W. R. 250. See also, as sustaining the rules stated in the text,

The fact that a devisee refuses to take under a will and elects to take against it has no effect upon the will except so far as the share of some other legatee may be diminished by his election. The person who loses by the election has the right, in equity, to have the property which has been relinquished sequestered for him to make good his loss. And this ancient and well recognized and reasonable doctrine of compensation is so consistent with the principles of equity and fairness that it has been invariably applied to the case of a widow who elects to take her dower against the will and under the law, and to forego the benefit of a provision made for her in the will in lieu of dower. Thus a devisee of land, upon which the dower of the widow becomes a charge by reason of her election to take against the will, is entitled to compensation out of the property, whether real or personal, which the will gave but which has been rejected by her.¹ So where the testator disposed of land which was owned by himself and some of his children as partners, giving it to his widow and some of his children, and the children who were partners declined to take under the will and established their rights by suit, it was held that the liquidated interest of the testator in the partnership was not distributable as intestate property, but that it went to the devisees who had been compelled to relinquish their devises by the election of the partners.²

Granting that the doctrine of election is based upon the principle of compensation and not upon that of forfeiture, and assuming also that the property which is relinquished by the person who makes the election against the will is to be held in trust

Cauffman v. Cauffman, 17 S. & R. (Pa.) 16, 25; *Boyles v. Murphy*, 55 Ill. (1870), 236; *In re Rawlings' Estate*, 81 Iowa, 701 (1891), 47 N. W. R. 992; *Devecmon v. Shaw*, 70 Md. 219, 16 Atl. R. 645; *Weeks v. Patten*, 18 Me. (1841), 42; *Morris v. Morris*, 119 Ind. 341, 21 N. E. R. 918; *In re Battione's Estate*, 136 Pa. St. 307, 27 W. N. C. 1, 20 Atl. R. 572. Property which is sequestered by a court as compensation to disappointed legatees will be divided among them in proportion to the amount of their

legacies. *Howells v. Jenkins*, 1 De G., Jo. & Sm. 617.

¹ *Sarles v. Sarles*, 19 Abb. N. C. (N. Y.) 322; *In re Frist's Estate*, 6 Dem. 431, 1 N. Y. S. 640; *Tehan v. Tehan*, 83 Hun, 368, 31 N. Y. S. 961; *In re Lyon's Estate*, 3 Pa. Dist. Co. R. 739; *Marriott v. Badger*, 5 Md. 306 (1854); *Key v. Griffin*, 1 Rich. Eq. (S. C.) 67; *Sawyer v. Freeman*, 161 Mass. 543. See also note 1, p. 1005.

² *Colvert v. Wood*, 25 S. W. R. 963, 93 Tenn. 454.

for the compensation of the person who is deprived by it, it remains to be considered whether the person electing to take against the will is bound to surrender the *whole benefit* which was given to him by the will, or does he lose *only as much of it as is needed to compensate those whom he has disappointed*. The question has been seldom under consideration in the cases for the reason that, if the property which is given under the will to the person who has a right to make an election is of *more value than his own* which the will gives to another, he simply *relinquishes his own* and takes under the will, and *neither legatee is disappointed, as each receives what the will gave him*. If his own property given away by the will is *more valuable* than what he receives under the will, he most likely will elect to retain his own property to the prejudice of the legatee to whom it was given by the will. In the latter case no question of compensation can arise, for the disappointed legatee gets *only what the party making an election relinquishes* under the will. He gets *all* of it, and cannot claim more.

In some few cases the question might arise whether the person who elects to take against the will is bound to surrender all that the will gives him, or must he surrender only so much of it as will *compensate the legatee whom his election disappoints*. In all such cases, in spite of some lack of harmony in the decisions, the rule seems to be that the person electing to take against the will shall be required to *give up only so much of his legacy as will make compensation to the person who is disappointed by his election*. After such person is indemnified, the surplus of the legacy, if any, belongs to the party making the election, and does not go to the heir-at-law or the next of kin of the testator as property undisposed of. Thus, if the legacy given to the party who elects was valued at \$10,000, and *his* property given in the will to a third person was worth \$100, though he should assert his right against the will to the latter, he would still have a right to claim the excess of his legacy over the value of his property given to another.¹

¹Delaney's Estate, 49 Cal. 79; Carman, 17 S. & R. (Pa.), 16, 25; Stump per v. Crowl, 149 Ill. 477, 36 N. E. R. v. Finley, 2 Rawle (Pa., 1828), 168, 1040; Wilbanks v. Wilbanks, 18 Ill. 174; Lewis v. Lewis, 13 Pa. St. 79, 17, 21; Weeks v. Patten, 18 Me. 42, 82; Van Dyke's Appeal, 60 Pa. St. 45; White v. Brocaw, 14 Ohio St. 481, 490; McIntosh's Estate, 158 Pa. (1863), 339, 348; Cauffman v. Cauff- St. 528, 535; Gallagher's Appeal, 87

§ 730. Presumption against necessity for election — Testator must intend to dispose of the property of another.— The ordinary presumption in all cases is that a man in making his will *intends to dispose of his own property alone*. An inten-

Pa. St. 200; Ferguson's Appeal, 138 Pa. St. 208; *Marriott v. Badger*, 5 Md. 306; *Roe v. Roe*, 21 N. J. Eq. (1870), 253; *Kinnaird v. Williams*, 8 Leigh (Va., 1836), 400, 408; *Streatfield v. Streatfield*, Cas. T. Talb. 176; *Lord Ranccliffe v. Parkins*, 6 Dow, 149, 179; *Lewis v. King*, 2 Brow. Ch. 600; *Bar v. Bar*, 3 B. P. C. Toml. 167, 178; *Freke v. Barrington*, 3 Bro. Ch. 274, 284; *Dashwood v. Peyton*, 18 Ves. 27, 41, 49; *Whistler v. Webster*, 2 Ves. 367, 372; *Blake v. Bunbury*, 1 Ves. 514, 523; *Greenwood v. Penny*, 12 Beav. 403, 406; *Ward v. Baugh*, 4 Ves. 627; *Ardesoife v. Bennett*, 2 Dick. 463; *Lady Cavan v. Pulteney*, 2 Ves. 544, 560; *Padbury v. Clarke*, 2 Mac. & G. 298; *Howells v. Jenkins*, 1 De G., Jo. & Sm. 617, 2 J. & H. 706; *Cooper v. Cooper*, L. R. 6 Ch. App. 15, 7 H. L. 53. An action for compensation will lie against the personal representatives of the party who has elected to take against the will. *Rogers v. Jones*, 3 Ch. Div. 688, 690; *Fytche v. Fytche*, 19 L. T. (N. S.) 343, 344. "Consequently, as between his (the son's) estate and her disappointed legatees, her disappointed legatees are entitled to put his estate to an election. That is, any disappointed legatee is entitled to say, you shall not have the benefit given to your estate by the will unless I have made up to me an equivalent benefit to that which the testator intended me to take. Sometimes this is called the doctrine of compensation, which is the meaning of the doctrine of election as it now stands. The disappointed legatee may say to the devisee, you are not allowed by a court of equity to take away out of the testatrix's estate that which you

would otherwise be entitled to until you have made good to me the benefit she intended for me. That means that no one can take the property which is claimed under the will without making good the amount; or, in other words, as between the devisees and legatees claiming under the will, the disappointed legatees are entitled to sequester or to keep back from the other devisees or legatees the property so devised and bequeathed until compensation is made. Thence arises the doctrine of an equitable charge or right to realize out of that property the sum required to make the compensation. If you follow out that doctrine you will see that the person taking the property so devised or bequeathed takes it subject to an obligation to make good to the disappointed legatee the sum he is disappointed. The very instrument which gives him the benefit gives him the benefit burdened with the obligation, and the old maxim *qui sentire commodum sentire debet et onus* applies with the greatest force to such a case as this." By the court by Jessel, M. R., in *Pickersgill v. Rodger*, 5 Ch. Div. 163, on p. 173. In Mr. Swanston's note to *Gretton v. Haward*, 1 Swanston, 433, it is said: "1st. That, in the event of election to take against the instrument, courts of equity assume judgment to sequester the benefit intended for the refractory donee in order to secure compensation to those whom his election disappoints. 2d. That the surplus, after compensation, does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied, for which alone the court controlled

tion on the part of the testator to dispose of the property owned by another person must either appear on the face of the instrument in express language or must arise from necessary implication.¹ It cannot be presumed to exist from the circumstances of the case only, or from the situation of the testator, nor can it be proved by his declarations of intention.

A man may dispose by will of property belonging to another which that other owns *individually and separately*, and in which the testator has no manner of interest or title and no right of ownership whatever. Or the testator may dispose of property which is *partly owned by another* and in which he, with that other, has a joint or common interest and ownership. Where

the legal right." In *Jennings v. Jennings*, 21 Ohio St. 81, Scott, C. J., says: "The doctrine of compensation, as incidental to testamentary election, is an old and well established one. And, resting as it does on principles of the clearest equity, no good reason is perceived for denying its proper application to the case of a widow who elects to withdraw her right of dower from the operation of the will and to forego the benefit of a provision made for her in the will in lieu thereof. A widow has a perfect right to insist that the dower, which the policy of the law awards to her, shall not be taken from her by the will of a deceased husband. But she has no equitable right, as widow, to insist that the benefit intended by the testator as a compensation for her dower shall be treated, upon her rejection of it, as a lapsed legacy or devise, and go to the heir as intestate property. The rule in cases of testamentary election is compensation or forfeiture, and not intestacy, and the principle of compensation is applied in the case of an election against the will by a widow equally with that of a similar election by any other devisee." In one case it was held that the property or its proceeds which are given to a widow in lieu of her dower goes to

the residuary legatee, when she renounces the provision made for her by the will and elects to take her dower in property which was included in the residuum. *Small v. Marburg*, 77 Md. 11, 25 Atl. R. 920.

¹*Thornton v. Thornton*, 11 Ir. Ch. R. 474; *Judd v. Pratt*, 13 Ves. 168; *In re Booker*, W. N. 1886, p. 18; *Blake v. Bunbury*, 4 Bro. C. C. 21; *Box v. Barrett*, L. R. 3 Eq. 244; *Forrester v. Cotton*, 1 Eden, 531, Amb. 388; *Wintour v. Clifton*, 21 Beav. 447; *Dashwood v. Peyton*, 18 Ves. 27, 49; *Dillon v. Parker*, 1 Swanston, 359, 376, 381; *Jervoise v. Jervoise*, 17 Beav. 566; *Stephens v. Stephens*, 3 Drew. 697, 1 De Gex & Jo. 62. The intention to put a devisee to an election cannot be inferred from a recital that the devisee owns or is entitled to an interest in property under an instrument other than the will, when the testator does not attempt to dispose of the property of the devisee in the will. Thus, for instance a recital in the will that one devisee receives less than another because the former has been provided for in a settlement, though the will does not purport or attempt to dispose of the property thus settled, does not put the devisee to an election, and he can take both under the will and under the settlement. *Box v. Barrett*, L. R. 3 Eq. 244.

the testator disposes of property belonging to another person *in which he has no interest whatever*, and the language of his will clearly points out and describes such property and transfers it to some other person than its present owner, no question can arise as to the intention of the testator to give the property of the other person, and consequently no necessity for any construction exists. But where the testator owns property in which another person also has a part interest, or a charge thereon, or where he owns a share in property and another person owns the residue, and the testator devises the whole property in vague or general language, the question at once arises, Does he intend to dispose of the *whole property, including the interest of the other person*, or does he intend to confine his disposition of the property exclusively to the interest which he owns? The reasonable presumption is in favor of the latter proposition, and the courts, in construing a general disposition of property in which the testator has only a partial interest, will favor a construction which will dispose only of the actual interest of the testator.

It will thus be seen that, where the testator has a limited interest in the property disposed of, it is much more difficult to create a case for an election upon the part of the person who owns it with him, than in the case of property which belongs wholly to another person in which the testator has no interest. Hence where the testator has an actual interest in the property which he disposes of in general words which may or may not include the interest of the other person, the other person will be put to his election only if an election is absolutely necessary in order to carry out the full intention of the testator. If the testator's language is cloudy or doubtful or ambiguous in meaning, so that it *may* be consistent with the intention of the testator that the person who has an interest in the property which he attempts to dispose of shall retain that interest and shall also hold what the will gives him, he will not be put to his election.

Accordingly where a testator devises his lands located at various places, which are particularly described, to his wife, and it appears that, while he owned separately certain estates in the places mentioned, he was also joint owner with his wife in other lands in the same places, the latter was not compelled to elect between her right as a surviving joint tenant and the devise

by the will. A testator will be presumed by a general devise to intend to give only his property over which he has an unlimited power of disposal, and in which no other person has any interest. The fact that he describes his lands by location in a general devise does not raise a case for an election simply because it may happen that the devisee also has an interest in other lands located there jointly with the testator.

The intention of the testator that a devisee shall be put to an election must be either distinctly expressed in the will, or it must arise from the strongest and most necessary implication. No man can be deprived of his property merely by conjecture. It must appear distinctly and clearly that permitting the party to retain both benefits would be irreconcilable and inconsistent with the will; and that to do so would throw the estate in confusion and direct the bounty of the testator into channels very different from those in which the will has caused it to flow. The doctrine of election is designed to prevent the perversion of the testator's intention. And if the will may have its full effect without an election, the person to whom a devise is given will not be compelled to elect; he may then take his own and also what the will gives him belonging wholly to the testator.¹

As an illustration of this rule we may instance a general be-

¹ *Hilliard v. Binford*, 10 Ala. (1847), 977, 987; *Green v. Green*, 7 Port. (Ala., 1838), 9; *Morrison v. Bowman*, 29 Cal. 337, 348; *Alling v. Chatfield*, 42 Conn. 276; *Hall v. Pierson*, 63 Conn. 832, 345; *Carter's Appeal*, 59 Conn. 576, 587; *Whiting's Appeal*, 67 Conn. 380, 389; *Tooke v. Hardeman*, 7 Ga. (1849), 20; *Moore v. Moore*, 4 Ind. App. 115, 118; *Gorham v. Dodge*, 122 Ill. 528, 535; *Bailey v. Duncan*, 4 Mon. (Ky.) 265; *Hall v. Hall*, 1 Bland Ch. (Md.) 130, 135; *Laidler v. Young*, 2 Har. & J. (Md.) 69; *Creswell v. Lawson*, 7 Gill & J. (Md.) 228; *McElfresh v. Schley*, 2 Gill (Md.), 181, 199; *Waters v. Howard*, 1 Md. Ch. 112; *Watson v. Watson*, 128 Mass. 152; *Norris v. Clark*, 10 N. J. Eq. (1854), 51; *Steele v. Fisher*, 1 Edwards' Ch. (N. Y.) 435, 451; *Smith v. Kniskern*, 4 Johns. Ch. (N. Y., 1819), 9; *Lasher v. Lasher*, 13 Barb. (N. Y.) 106; *Jackson v. Churchill*, 7 Cow. (N. Y., 1827), 287; *Adsit v. Adsit*, 2 Johns. Ch. 448, 450; *Larrabee v. Van Alstine*, 1 Johns. (N. Y., 1806), 370; *Wilson v. Arny*, 1 Dev. & Bat. (N. C.) 376; *Havens v. Sackett*, 15 N. Y. 365; *In re Hayden*, 7 N. Y. S. 313, 315; *Hamilton v. Buckwalter*, 2 Yeates (Pa., 1800), 389; *Duncan v. Duncan*, 2 Yeates (Pa.), 302; *Huston v. Cone*, 24 Ohio St. (1873), 11, 20; *Quarles v. Garrett*, 4 Des. (S. C.) 146; *Wilson v. Hayne*, Cheves' L. (S. C., 1839), 37, 40; *Williams v. Gray*, 1 Coldw. (Tenn.) 104; *Herbert v. Wren*, 7 Cranch, 370; *Blunt v. Gee*, 5 Call (Va.), 481; *Lord Raneliffe v. Lady Parkins*, 6 Dow, 149, 179; *Maddison v. Chapman*, 1 John. & Hem. 470; *Padbury v. Clark*, 2 M. & G. 208; *Pickersgill v. Rodger*, L. R. 5 Ch. D. 163, 170.

quest by a testator of all his property or estate to a person with whom he is joint owner of personal property. The person who is a joint tenant with the testator, and who receives a legacy under the will, is not compelled to elect between the legacy and what he or she would take by survivorship by a gift to others of all the *estate of the testator of whatever kind*.¹ Thus, where corporation stock stood in the name of the testator and his wife jointly, the latter was not put to an election where her husband devised "my shares" in the A. company to a stranger, although the husband had no stock of his own of which he was sole owner.² The intention to put a person to an election must appear. Thus a legatee, by his acceptance of a money legacy, is not estopped from claiming that land which, by the will, was given to a residuary devisee, was owned by the legatee, and that a deed signed by him, absolute on its face, by which the testator held the land, was in fact a mortgage, and that the mortgage debt had been satisfied, unless the intention to require an election is clear.³ But where A., having only a life estate, attempted to sell the fee which belonged to his children

¹ Dummer v. Pitcher, 5 Sim. 85, 2 My. & Cr. 262.

² Shuttleworth v. Greaves, 4 My. & Cr. 38. "The authorities, as I understand it, mean no more than to point out forcibly the difficulty there is in raising a case of election where the testator has a limited interest in the property as to which the election is to be raised; and no doubt there is more difficulty in such cases than in the ordinary case of the disposition of an estate belonging to another person, and in which the testator had no interest, inasmuch as every testator must *prima facie* be taken to have intended to dispose only of what he had power to dispose of, and as, in order to raise a case of election, it must be clear that there was an intention, on the part of the testator, to dispose of what he had not the right or power to dispose of." By the court in Wintour v. Clifton, 8 De G., M. & G. 641, 650. In order that a case for election may arise it

is absolutely essential that the testator should intend to dispose of another person's property. Thus, where a testator, after making his will in which he devised land to his son and daughter, respectively, conveyed to his daughter a portion of the land which he had devised to his son, the daughter is *not* required to elect between the property given by this conveyance and that by the will, for the reason that, in the absence of any proof showing that the conveyance was in satisfaction of the devise, it will be presumed that the testator, having by law a full power of disposition over his own property during his life, though he had made a will, intended she should have both. Hattersley v. Bassett, 25 Atl. R. 332, 50 N. J. Eq. 577.

³ Tompkins v. Merriman, 155 Pa. St. 440, 447, 28 Atl. R. 659, citing Zinn v. Lebo, 151 Pa. St. 345; Stump v. Findley, 2 Rawle (Pa.), 168.

B. and C., covenanting that when they should attain their majority they would join in the conveyance, and B. did so, while C. refused, it was held that, where C. accepted property devised to him by his father, upon the express condition that if he refused to confirm the sale he should not be entitled to it, he should be enjoined from claiming any interest in the property which had been sold.¹ So, too, where A., who had only a life interest, devised the land to several, giving B., who was a part owner of the fee, a life estate in the same lands devised, and all the devisees entered upon the land, B. joining in selling it, B., having *elected to take under the will* by accepting the life estate given by the will, was estopped from claiming under the deed as remainderman in fee.² An election is also required where a testator gives property to A. upon the condition that he shall refrain from pressing a claim which he has against B. The proviso in such case constitutes a gift of A.'s property to B., and A. is required to elect between the inconsistent interests.³

§ 731. Finality of an election — Its revocation when made by mistake or procured by fraud or bad faith.— An election, when made by a competent person with a full understanding of his rights and a reasonable knowledge of the facts, is final, both as to him and as regards his representatives. Particularly is this so where the rights of third persons who are purchasers of the property in good faith and for value have attached, who would be prejudiced by permitting a revocation of the election. The maxim *ignorantia legis neminem excusat* is applicable to the case of a person making an election between a provision which was made for him in a will and the property which belongs to him and which by the will is given to another. This rule is most frequently invoked in the case of the widow's election.

As a matter of fact it will be found that most persons of

¹Leonard v. Crommelin, 1 Edw. (N. Y.) 206.

²Borden v. Ward (S. C., 1889), 9 S. E. R. 300.

³Miller v. Cotton, 5 Ga. 341. Where the testator devised a farm, which was owned by his wife, as though it was his own, and gave her a legacy out of his estate, it was held that she,

and her heirs after her death, must elect between the legacy and the farm. Fulton v. Moore, 25 Pa. St. 368. And the same rule was applied where the testator disposed of "property yet due my wife as heiress," at the same time giving her a legacy. Clay v. Hart, 7 Dana (Ky.), 6.

both sexes are well acquainted with the rule of law by which a woman enjoys a dower right to and interest in the real property of her husband of which he cannot deprive her without her consent. If, however, it should happen that the widow or other person is not informed as to his or her legal rights, and it appears that the person electing was induced by one who is well informed, and who knows that the former is ignorant,¹ to relinquish what she would receive as dower, or he for any interest he may be entitled to, in exchange for an inadequate gift, the election would undoubtedly be set aside in equity. Such a state of things will involve fraud which equity will not tolerate. The party who holds the legal title to the land in which the dower has been relinquished will be decreed in equity as a trustee for the widow, at least so far as her right of dower is concerned. But the cases in which a widow, or any other person who has made an election, will be permitted to revoke it are not limited to those in which *actual fraud* is involved. Equity will always relieve against accident or mistake.

While the consequences of a mistake of law are not relieved against in equity, a mistake of fact is always a subject for the consideration of equity, which will administer the appropriate remedy in every case where the rights of innocent parties who are purchasers for value will not be injured. The rule is that the person called on to elect must be permitted to acquire a reasonable knowledge of the condition and the value of the property which he is to forego as compared with that which he is to receive. He cannot be required to make an irrevocable election unless he has such a knowledge of the subject as will enable him to make an intelligent choice.² For it is not necessary that the

¹ In *Light v. Light*, 21 Pa. St. 407, in 1853, Black, C. J., said: "If a widow who is acquainted with all the facts, but is wholly unaware that by law she has a right of dower, is induced by one who knows the law, and at the same time knows her ignorance of it, to release or assign it for a totally inadequate consideration, she ought to be relieved. But where the error is her own, and no

any fraudulent advantage taken, her acts, done under the influence of it, are as binding upon her as if she knew the law perfectly."

² Though an election which has been intelligently made is final, an election may be made to take effect upon the occurrence of a contingency; as, for example, an election to take effect if the party electing shall die within a certain period. *McCallister v. Brand*, 11 B. Mon. (Ky.) 370.

party who has a right to elect should have been *mised or actually deceived* by acts or spoken words in order that he may be permitted to revoke his election. His legal rights should be explained to him. He should be informed by the executor of all the circumstances of the estate; and if those who will gain by his election *to take under the will* are silent, and by their silence permit him to take property under the will which is of little value *as compared with what he has the right to take against the will*, they cannot subsequently complain when, after obtaining a fuller knowledge, he repudiates his choice and relinquishes what the will has given him.¹ Thus, the receipt of

Though a widow who is desirous of revoking her election has received the benefit under the will and expended a part of it, she may, on being more fully informed of her rights, revoke her election if the payment of the legacy to her has no effect in preventing a distribution of the estate in accordance with the intentions of the testator. *Yorkly v. Stimson*, 97 N. C. 236, 1 S. E. R. 452.

¹ *Clark v. Hershey*, 52 Ark. 473, 12 S. W. R. 1077; *Burroughs v. De Couts*, 70 Cal. (1886), 371; *Dabney v. Bailey* (1871), 42 Ga. 521, 523; *Sewell v. Smith*, 52 Ga. (1874), 567; *Vanzant v. Bigham*, 76 Ga. 759; *Carper v. Crowl*, 149 Ill. 465, 480; *Wilbanks v. Wilbanks*, 18 Ill. (1857), 17, 21; *Ward v. Ward*, 133 Ill. (1890), 417, 25 N. E. R. 1012; *Hawkins v. Bohling*, 48 N. E. R. 94, 96, 168 Ill. (1897), 214; *Fry v. Morrison*, 159 Ill. 254, 42 N. E. R. 774; *Garn v. Garn*, 123 Ind. 687, 689, 35 N. E. R. 394; *Richart v. Richart*, 30 Iowa (1870), 465; *Sill v. Sill*, 31 Kan. (1884), 248; *Grider v. Eubanks*, 12 Bush (Ky.), 510; *Stoddard v. Cutcompt*, 41 Iowa, 329, 334; *Reppert v. Pellizzarro*, 83 Iowa, 497, 500; *Tomlin v. Jayne*, 14 B. Mon. (Ky., 1858), 162; *Leach v. Prebster*, 39 Ind. 492; *Craig v. Conover*, 80 Me. 353, 355; *Weeks v. Patten*, 18 Me. 42, 45; *Reed v. Dickerman*, 12 Pick. (Mass.) 149,

150; *Pratt v. Douglas*, 38 N. J. Eq. 516; *Macknet v. Macknet*, 29 N. J. Eq. 54, 57; *Havens v. Sackett*, 15 N. Y. 365; *Adsit v. Adsit*, 2 Johns. Ch. (N. Y., 1817), 448, 450; *Hall v. Hall*, 2 McCord (S. C.), Eq. 269; *Yorkly v. Stimson*, 97 N. C. 268, 1 S. E. R. 452; *Davis v. Davis*, 11 Ohio St. 386 (holding that an order of the court is necessary in the case of a revocation of an election); *Huston v. Cone*, 24 Ohio St. (1873), 11, 20; *Anderson's Appeal*, 36 Pa. St. 476; *Duncan v. Duncan*, 2 Yeates (Pa.), 302; *Light v. Light*, 21 Pa. St. 407, 412; *Kreiser's Appeal*, 69 Pa. St. 194; *Craig v. Walthall*, 14 Gratt. (Va.) 518, 525; *In re Woodburn's Estate*, 138 Pa. St. 606, 27 W. N. C. 305, 21 Atl. R. 16; *Snelgrove v. Snelgrove*, 4 Des. Eq. (S. C.) 27; *Leach v. Leach*, 65 Wis. 284, 291; *United States v. Duncan*, 4 McLean C. C. 99; *Wilson v. Thornbury*, L. R. 10 Ch. App. 239; *Briscoe v. Briscoe*, 7 Ir. Eq. R. 123, 1 Jo. & L. 334; *Campbell v. Ingilby*, 21 Beav. 567, 582; *Sweetman v. Sweetman*, 2 L. R. Eq. 141; *Edwards v. Morgan*, 13 Price, 782, 1 Bligh (N. S.), 401; *Wintour v. Clifton*, 21 Beav. 447, 468, 8 De G., Mac. & G. 641; *Pusey v. Desbouverie*, 3 P. Wms. 315; *Boynton v. Boynton*, 1 Bro. C. C. 445; *Wake v. Wake*, 3 Fra. C. C. 255; *Kidney v. Coussmaker*, 12 Ves. 136, 154; *Dillon v. Parker*, 1 Sw. 381, 382.

a legacy will not prevent the legatee from subsequently contesting a will upon the grounds of testamentary incapacity and undue influence, where, at the time of his acceptance of the legacy, he did not know of the facts constituting the undue influence; while it appeared that other beneficiaries knew of these facts and fraudulently kept their knowledge of them from him, with a view of procuring him to accept the legacy.¹

Ordinarily a court of equity will give relief where a mistake of fact or a flagrant misunderstanding as to the rights of the party is shown; but equity will not relieve a party who has failed to use due diligence to ascertain his rights. In many states the statutes fix a time within which the right to elect must be exercised, and they are in the nature of statutes of limitation. They will prevent a subsequent exercise of the right. Ignorance of the law is no excuse, either in equity or in law; and as the widow or other person having the right to elect is conclusively presumed to know the law, he or she will be limited to the statutory period to exercise the right. It is therefore the duty of such persons to ascertain the extent of the estate, and if they fail to make an election within the period limited by statute, equity will not extend the time solely because they were ignorant of the nature and extent of the property.²

But where a person has been prevented from making an election by some unavoidable accident or by the fraud of others, equity will invoke the maxim "that has been done which ought to have been done," and will make an election for the person as of the date of the death of the testator. Where the person who has a right to elect has died without doing so, and his failure to elect is either the result of the silence or of the fraud of others, or of circumstances over which he has had no control,

¹ *White v. Mayhall* (Ky.), 25 S. W. R. 881. If a widow intending to dissent from her husband's will, to renounce her rights under it, and to accept her dower in place of what the will gave her, is prevented from doing so, within the time required by the statute, by the fraud of the executor and his false statements of the value of the estate, a court of equity will relieve her and permit

her to elect after the statutory period has expired. She will be placed in the same situation in every respect as though she had dissented in time, and as the executor is a *quasi*-trustee, the legal period of limitation does not apply. *Smart v. Waterhouse*, 10 Yerg. (Tenn., 1833), 94, 104.

² *Akin v. Kellogg*, 119 N. Y. 441, 444 (1890), 7 Am. Pro. R. 570, 575.

as, for example, where he was mentally unable to give any attention to the matter, the court will make the election for him, or, as an exception to the general rule, permit his heirs to do so.¹

§ 732. Case for election does not arise where will is invalid.—It was settled in England as early as 1749 that neither a devise of land by an infant, nor by a married woman not having capacity to devise, nor a devise contained in a will which was improperly executed as a devise of land, but which was valid to pass personal property, would put the heir to an election.

Prior to the passage of the Victorian Statute of Wills an unattested and often an unsigned writing was valid as a will of personal property; while an attested and subscribed instrument would be required, under the statute of frauds, in the case of a devise of real estate. The question, therefore, would arise whether the heir was compelled to elect in the case of an unattested will which was valid to pass personal property, but which was invalid as a devise of land, and which gave the heir a legacy while devising to a stranger land which would have descended to the heir. The English courts generally held that, in order that the heir should be compelled to elect, there must be a will valid to pass real estate. A will not valid for that purpose affords no intention to devise land away from the heir; and, as the intention to devise land away from the heir was not before the court by any legal evidence, the will would be read in equity as though the invalid devise was not in it. So in the case of a will properly executed by a competent testator

¹ Thus, where the testator in his will gave his son the right to purchase a piece of land for a certain sum, and gave him a fixed period within which the purchase price was to be paid, and provided also that, if he should elect to purchase under the will, the land in question should vest in testator's trustee for the life of the son with remainder in trust for his heirs, but mentioned neither the time within nor the mode in which the election must be made, it was held under the circumstances that a written election was not required. The land in question was worth much more than the sum mentioned. At the date of the death of the testator the son was on his death-bed and survived only a few days, during which time he was unable to attend to any business. It appeared that he had fully made up his mind to buy, and that the trustees knew of this. It was therefore held that no declaration, oral or written, of an intention to elect was required, and that his heir had the right to take the land on the condition named. *Parker v. Seeley*, 38 Atl. R. 280 (N. J. Eq., 1897).

to pass personal property, but not properly executed to pass real property, in which the testator devised his land to a stranger, while giving a legacy to the heir, the latter was not obliged to elect. He might take both the legacy and the land which descended to him.¹ So, also, an infant at the common law might execute a testament disposing of his personal property, though he could not, until he attained his majority, devise his lands.² Hence, if a will, which had been made by an infant, attempted to devise his lands, which devise would be invalid, also gave the heir of the infant a legacy, the heir was not compellable to elect between the legacy given him by the will and the lands which would descend to him by reason of the partial invalidity of the will. He might take both.³

The same rule was applicable in the case of a married woman who, independently of modern statute, could not devise her lands, even with her husband's consent, married women being by statute expressly excepted from the operation of the statute 32 Henry VIII, chapter 1, conferring the power to devise lands. In consequence of this fact the real property of a married woman was usually settled on her in trust with a power of appointment in her, and she might then appoint the legal or equitable interest, and her appointment would be enforced in equity. It was valid, not as a will under the statute, but as an execution of the power created in the original deed of settlement.⁴ If, however, a married woman devised lands which were settled to her separate use to the heir, or gave him a legacy, and in the same will devised land which was not thus settled to some person other than her heir, the latter was not compelled to elect between what the will gave him and what he would have taken as an heir. The testatrix not having capacity to devise, her will was void as far as it attempted to dispose of

¹ See cases cited in note 3.

² *Ante*, § 120.

³ *Hearle v. Greenbank*, 1 Ves. Sr. 298, 306, 3 Atk. 695, 697, 715, 717; *Carey v. Askew*, 8 Ves. 492, 1 Cox, 341, 344; *Staples v. Hawes*, 24 Misc. R. 475; *Pryor v. Pendleton* (Tex., 1898), 47 S. W. R. 706; *Goodrich v. Snelgrove*, 4 Des. (S. C., 1812), Eq. 274; *Melchor v. Burger*, 1 Dev. & Bat. (N. C.) 634, 635;

Kearney v. Macomb, 16 N. J. Eq. 189. Compare *Carper v. Crowl*, 149 Ill. 478, 36 N. E. R. 1040. And see also *Thellusson v. Woodford*, 13 Ves. 209; *Buckeridge v. Ingram*, 2 Ves. 652, 665; *Sheddon v. Goodrich*, 8 Ves. 481, 482; *McElfresh v. Schley*, 2 Gill (Md.), 181; *Jones v. Jones*, 8 Gill, 197.

⁴ *Ante*, § 120.

lands which were not settled to her separate use. The heir of the married woman could take under the will and likewise as an heir. The personal property of the married woman belonged to her husband, though she might dispose of it by her will with his consent, and, if it were settled on her to her separate use, without his consent. So where a woman made a will by which she gave property to her husband over which she had a power of appointment, and in the same will gave property which was not settled to her separate use to some person other than her husband, which devise or bequest was invalid unless her husband should consent to it, the latter was not compelled to elect. He could claim the property devised to him out of his wife's separate estate, while at the same time repudiating the will so far as it gave away property which he had a right to claim as her husband.¹

Although the rule that the heir is not compelled to elect in the case of a will which is valid to pass personal estate, but invalid to pass real estate, is well settled, it has not received the unanimous approval of the courts. Of course if a legacy given to the heir in an improperly attested or partly invalid will is upon an express condition that the legatee shall give up real estate which, by the will, is given to another person, a case of election arises, and the heir cannot take both the legacy and the undisposed of real estate.²

The condition is express, and a distinction between an express condition and an implied condition has been made. But the distinction is rather technical, and, inasmuch as the doctrine of election is largely based upon a presumption of intention which involves an implied condition, it is not easy to see why or in what respect the case of the heir should form an exception to the general rule. The will so far as it gives personal property is valid, and *all of it, so far as it shows the intention of the testator regarding such property, ought to be read*. If on perusing the whole will it is apparent that the testator intended the heir to elect, though he has not expressly so stated his intention, why should not the condition to elect be implied?³

¹ Rich v. Cockell, 9 Ves. 369.

481, 482, 496; Vandyke's Appeal, 60

² Hearle v. Greenbank, 1 Ves. Sr.

Pa. St. 489; Kearney v. Macomb, 16

298, 306; Boughton v. Boughton, 2

N. J. Eq. 189, 196.

Ves. Sr. 12; Carey v. Askew, 8 Ves.

³ Sheddon v. Goodrich, 8 Ves. 481,

492, 497; Sheddon v. Goodrich, 8 Ves.

496; Gardiner v. Fell, 1 Jac. & Walk.

Inasmuch, however, as the modern statutes of wills, both in England and in America, require the same formalities of execution in the case of wills bequeathing personal property as in the case of wills devising real property, and inasmuch as married women have the power to dispose of all land owned by them, the question discussed, while of historical interest, is at the present time of little practical importance, except so far as the disposal of an infant's land is concerned, or so far as a will devising land away from the heir may be invalid because the devise is in contravention of the rule of perpetuities or is otherwise illegal.

Whether the doctrine of election is applicable to the case of a will which gives a benefit to the heir, *where the testator subsequent to its execution has acquired other land which does not pass under it*, has been differently decided in England and America. In England it was held, prior to 1 Vic., c. 26, that the heir of the testator might take what the will gave him as well as the after-acquired land which the testator *had attempted to devise*, but upon which the will did not operate. He was not under the necessity of relinquishing the land devised, for the law raised the conclusive presumption that by failing to republish the will the testator intended that his after-acquired lands should descend to the heir.¹ In the United States the authorities are divided upon this question. It has been held that where a testator gave A. real property and also made him a residuary legatee by a clause not sufficient to pass after-acquired lands, and devised prop-

22; *Wilson v. Wilson*, 1 De Gex & Smale, 152; *Brodie v. Barry*, 2 Ves. & Bea. 127, 130; *Carey v. Askew*, 1 Cox, 241, 244; *Melchor v. Burger*, 1 Dev. & Bat. (N. C.) Eq. 634, 637.

¹ *Churchman v. Ireland*, 4 Sim. 520, 523, 529, 1 Russ. & My. 250; *Thelluson v. Woodford*, 13 Ves. 209, 211, 1 Dow, 249; *Tennant v. Tennant*, 2 L. & G. 516; *Schroder v. Schroder*, Kay, 578, 24 L. J. Ch. (N. S.) 510; *Hance v. Truwhitt*, 2 Johns. & Hem. (Eng.) 216. By a will made in 1832, a testator, who died in 1835, devised certain freehold property, which at the date of his will he had contracted to purchase, to his three sons, and directed that,

if the purchase had not been completed in his life-time, his executrix should complete it out of his personal estate, and cause such property to be assured and limited to the uses therein expressed concerning it. In 1834 said freehold property was conveyed to the testator in fee to uses to bar dower. *Held*, that the heir-at-law of the testator (his eldest son) was not bound to elect between taking such freehold property as heir, and taking the benefits given to him by the will; the devise of the freehold property having been revoked by the form of the 1834 conveyance. *Jacob v. Jacob*, 78 Law T. (N. S.) 825.

erty in trust for the testator's heir, and *subsequently the testator purchased lands*, it was held that the heir could not take under the will and also claim as heir the after-acquired lands. He was compelled to relinquish the benefit under the will.¹ It has also been held that where the heir is given a legacy or a devise by the will, and land is given to others in the same will, and the latter disposition of land is void, because, for example, it violates the statute against perpetuities, so that the land devised descends to the heir, he will be compelled to elect between what the will gives him and what he takes because of intestacy.²

§ 733. Party taking title indirectly not put to his election by a gift under the will.—In order that a party to whom something is given by a will shall be put to an election, it is necessary that the testator shall give him a benefit *by the will directly and not derivatively*.³ An illustration of this occurs where a testator by his will gives property to a man and to his wife *respectively*, and the wife, being also an heir of the testator, elects to take against the will. She must then surrender what the will gives her. But her husband is entitled *to his curtesy in the property which she takes as heir against the will*, and he may, at the same time, take the legacy the will gives *him*, for the reason that the source of title in each case is separate and distinct. Moreover, complete compensation having once been made by the wife⁴ when she elected to take against the will, the matter is at an end.⁵ So, too, one of several heirs or next of kin of the testator may retain what descends to him from another heir or next of kin of the testator, though he has given up, on his election to take under the will of the testator, what he was entitled to as heir of the testator.⁶ So, also, and for the reason

¹ McElfresh v. Schley, 2 Gill (Md., 1844), 181, 199, 200; Philadelphia v. Davis, 1 Whart. (Pa., 1836), 490. *Contra*, in the case of a widow's election, Raines v. Corbin, 24 Ga. 185; Gibbon v. Gibbon, 40 Ga. (1869), 562; Chapin v. Hill, 1 R. I. (1840), 446.

² Thellusson v. Woodford, 13 Ves. 209, 221; Blunt v. Clitheroe (1805), 10 Ves. 589, 593; Hawley v. James, 16 Wend. 1, 61, 141; Sanford v. Goodell, 28 N. Y. S. 129, 7 Misc. R. 334; Per-

sons v. Snook, 40 Barb. (N. Y.) 144; Bloomer v. Bloomer, 2 Brad. (N. Y.) 339.

³ Moore v. Baker, 4 Ind. (1853), 115, 117; Bennett v. Harper, 36 W. Va. 546, 15 S. E. R. 143.

⁴ Cavan v. Pulteney, 2 Ves. Jr. 544, 555.

⁵ Cavan v. Pulteney, 2 Ves. Jr. 544, 554, 3 Ves. 384.

⁶ Wilson v. Wilson, 1 De G. & Sm. 152; Howells v. Jenkins, 2 John. &

that he takes derivatively and not directly, A., who takes property as a legatee under the will of B., is not estopped from also taking a legacy under the will of C. by the fact that C. is also a legatee under B.'s will and has elected to take against the will. The property which A. takes under the will of C., though it was taken by C. on his election against the will of B., under which A. receives a legacy, is taken by A., derivatively through C., and not directly from B. A. need not in receiving his legacy under C.'s will renounce what he has given by the will of B.¹

§ 733a. The period within which the election must be made.—The person who is under an obligation to elect must be allowed reasonable time and opportunity to acquire a knowledge of the property which is to be delivered to him under the provisions of the will. In some cases he must also be permitted to inform himself of the value of what he is called upon to relinquish. This would be the case where a widow has to elect between a legacy of a definite amount and her dower in real property, the market value of which is difficult to estimate. The person who has to elect has the right to demand that he shall have an opportunity to acquire such information as will enable him or her to make an intelligent election. In England, if the estate is in a complicated condition, he may file a bill in equity to have all proper accounts taken and to have other equitable relief in case he is to make an election which is irrevocable. In the United States a court of probate, at least in the absence of a statute requiring an election to be made within a specified period, would permit a reasonable delay in the settlement of the accounts of the executor for the purpose of allowing an election. The person is allowed a reasonable time; but what shall constitute a reasonable time in any particular case depends upon the particular circumstances of that case.² In particular cases a devisee has been allowed to elect after the lapse of a period of many years.³ But where the delay of the party to elect has resulted in others acquiring

Hem. 706; *Cooper v. Cooper*, L. R. 6 Ch. App. 15, 21, L. R. 7 H. L. 53, 79.

¹ *Beem v. Kimberly*, 73 Wis. 343, 39 N. W. R. 542.

² *Newman v. Newman*, 1 Bro. C. C. 186; *Wake v. Wake*, 8 Bro. C. C. 255,

1 Ves. Jr. 335; *Chalmers v. Storril*,

2 Ves. & Bea. 222; *Hender v. Rose*, 3 P. Wms. 124; *Whistler v. Whistler*, 2 Ves. Jr. 367, 371.

³ *Sopwith v. Maugham*, 80 Beav. 235; *Dillon v. Parker*, 1 Sw. 381, 386.

rights because of his apparent acquiescence, equity will not permit these rights to be prejudiced by the subsequent exercise of the right of election.

§ 734. **Whether parol evidence is receivable to show an intention to require election.**—In a few of the early cases evidence of the testator's declarations was received for the purpose of showing that he believed he had the absolute ownership of the property which he devised, and that by devising property as his own, which in fact belonged to another, he intended to put the other to an election.¹ Later cases repudiate this rule, holding that the intention of the testator to dispose of what was not his own must be ascertained solely from the will.² But the rule excluding parol evidence is applicable only to the declarations of the testator. It is always admissible to prove by parol the circumstances by which the testator was surrounded, the condition and character of all property disposed of in the will, its ownership, and the relations of the parties.

§ 735. **What acts constitute an election to take under the will.**—No rule exists, except so far as the widow's election is concerned, which requires an election between a testamentary gift and an inconsistent claim to be made in any particular manner. In some of the states statutes have been enacted which require that a widow's election to take *against the will* shall be manifested by a writing signed and executed by her with certain formalities and with a full knowledge of her rights. The writing thus executed must be filed in court, and her election is then irrevocable.

But in the absence of such a statute an election to take under

¹ *Pulteney v. Darlington*, 2 Ves. Jr. 553, 554, 555. & Bea. 187, 192; *Rutter v. Maclean*, 4 Ves. 537; *McLeod v. McDonnell*, 6

² *Blake v. Bunbury*, 1 Ves. Jr. 528; *Clementson v. Gandy*, 1 Kee. 309; *Ala.* (1844), 236, 239; *Philadelphia v. Leake v. Randall*, 1 Vin. Abr. 188; *Davis*, 1 Whart. (Pa.) 490; *Timberlake v. Parish*, 5 Dana (35 Ky., 1837), 345; *Waters v. Howard*, 1 Md. Ch. (1846), 112; *McElfresh v. Schley*, 2 Gill (Md.), 181, 182, 199, 200; *Sherman v. Lewis*, 44 Minn. 107; *Chapin v. Hill*, 1 R. I. 446; *Macey v. Shumate*, 22 W. Va. 474; *Atkinson v. Sutton*, 23 W. Va. 197; *Miller v. Springer*, 70 Pa. St. M. & K. 511; *Welby v. Welby*, 2 Ves. 253.

or against a will may be manifested in other modes. An express and positive declaration by the party who is required to elect, to the effect that he accepts one or the other of the two inconsistent benefits, is usually conclusive of an intention to elect. So the fact that the person who has the right to elect expresses satisfaction, orally or in writing, with the provisions of the will which are in his favor, is strong evidence of his intention to abide by it.¹ And expressions of satisfaction, coupled with an entry upon the lands devised; or, where no actual entry or occupation is possible; where he receives and enjoys the rents and profits of the land; and *a fortiori*, where he conveys the land devised to him to another by sale or mortgage, may raise a conclusive presumption that he has elected to take under the will. Having gone so far in asserting his claim to the estate which the will gave him, he cannot be heard to object to its provisions; for, by taking title under the will, he has recognized the force and validity of its provisions for all purposes, and is estopped to assert that it is inoperative as regards the claims of others.²

¹ Craig v. Walthall, 14 Gratt. (Va., 1858), 518, 525.

² Reeves v. Garrett, 34 Ala. 563; Clark v. Hershey, 52 Ark. (1889), 473, 12 S. W. R. 1077; Burroughs v. De Couts, 70 Cal. 371, 11 Pac. R. 734; Bennett v. Packer, 39 Atl. R. 739, 741 (Conn., 1898); Shivers v. Goar, 40 Ga. 676; Sewell v. Smith, 52 Ga. (1874), 567; Vanzant v. Bigham, 76 Ga. (1886), 759; King v. Skellie, 94 Ga. 147, 3 S. E. R. 614; In re Smith, 108 Cal. 116, 40 Pac. R. 1037; Fry v. Morrison, 159 Ill. 254, 42 N. E. R. 774; Davis v. Hoover, 112 Ind. (1887), 423, 14 N. E. R. 468; Larkin v. McManus, 81 Iowa, 724, 726; Richart v. Richart, 30 Iowa, 465; Stoddard v. Cutcompt, 41 Iowa, 329; Herr v. Herr, 90 Iowa, 538, 58 N. W. R. 897; Reppert v. Pellizzarro, 83 Iowa, 497, 500, 50 N. W. R. 19; Craig v. Conover, 80 Iowa, 853, 355; In re Franke's Estate, 97 Iowa, 704, 66 N. W. R. 918; Gore v. Stevens, 1 Dana (81 Ky., 1833), 201, 204; Grider v. Eubanks, 12 Bush (75 Ky., 1877),

510; Smart v. Easley, 5 J. J. Marsh. (28 Ky., 1830), 215; Smith v. Bone, 7 Bush (Ky., 1870), 367; Weeks v. Patten, 18 Me. (1841), 42; Sanders v. Sanders, 22 Miss. 81, 87 (1850); Macknett v. Macknett, 29 N. J. Eq. 54; Jones v. Powell, 6 Johns. Ch. (N. Y.) 194, 199; Thompson v. Hook, 6 Ohio St. 480; Fulton v. Moore, 25 Pa. St. 368; Bradfords v. Kent, 48 Pa. St. 474; Cox v. Rogers, 77 Pa. St. 160; Chace v. Gregg, 88 Tex. 552, 32 S. W. R. 520; Waterbury v. Netherland, 6 Heisk. (Tenn.) 512; Hatch's Estate, 60 Vt. 160, 18 Atl. R. 814; Craig v. Walthall, 14 Gratt. (Va.) 518, 525; Beem v. Kimberly, 72 Wis. 343, 39 N. W. R. 542. See also Wake v. Wake, 1 Ves. Jr. 335, 3 Bro. C. C. 255; Padbury v. Clarke, 2 Macn. & G. 298, 306, 307; Dillon v. Parker, 1 Sw. 359, 380, 387; Spread v. Morgan, 11 H. L. Cas. 588; Sopwith v. Maugham, 30 Beav. 235; Dewar v. Maitland, L. R. 2 Eq. 834; Campbell v. Ingilby, 21 Beav. 582; Tibbitts v. Tibbitts, 19 Ves. 603. Tes-

The legal presumption is that a widow knew, if she accepted a legacy, she would be barred from claiming against the will. Whether the facts as proved constitute an election is always a question of law to be determined by the court.¹

It cannot, as matter of law, be said that the fact that the person who has the right to elect accepts the office of executor under the will, performs the duty of that office and receives proper compensation therefor, or even a specific legacy for his trouble, which would be remuneration for services and not bounty, constitutes an election on his part to take under the will. Thus, in Massachusetts it was held that the mere receipt of compensation by a husband, who was his wife's executor, did not constitute an election by him to abide by his wife's will which gave him no property.²

The contrary has been held where a husband wrote his wife's will, qualified and acted as executor under it, paid debts and legacies, filed his accounts and received his compensation as the executor. He was held to have elected to take under the will. But in each case he had paid to himself, as legatee, the

tator's widow, who was given a life estate in realty and specific personal chattels by the will, with a direction that she would convey her own realty to testator's son, did not, by entering into possession of such realty and chattels, elect to take them and convey her own estate, where she also kept the latter, and no affirmative action was had to compel her to so elect. *Shanley v. Shanley*, 54 N. Y. S. 653. An election to take land, either for or against the will, is shown by mortgaging or selling it. *Pratt v. Felton*, 4 Cush. (Mass.) 474; *Borden v. Ward* (S. C., 1889), 9 S. E. R. 300; *Rogers v. Jones*, L. R. 3 Ch. Div. 688. If a wife accepts a legacy she will be barred of dower after enjoying the same for a year and acquiescing in the sale of land in which she was dowable. *Jones v. Powell*, 6 Johns. Ch. (N. Y.) 194, 199.

¹ *Elton v. Moore*, 25 Pa. St. 368. A widow who has accepted personal

property bequeathed to her, and has also received from the executor the rents of land given her in lieu of dower, will *prima facie* be presumed to have consented to take under the will, and the burden of proof is then on her to show that she had not made an election or renounced her dower. *Hill v. Hill* (N. J. Eq., 1898), 41 Atl. R. 943. A legatee's recognition of the executor named in the will by executing an order on the executor to pay a third person a specified sum, where the legatee herself received nothing therefrom, and the money was paid from a fund undisposed of by the testator, does not constitute an election to take under the will, so as to estop the legatee from denying its provisions, where such act caused no injury to the other legatee. *Pryor v. Pendleton* (Tex., 1898), 47 S. W. R. 706.

² *Tyler v. Wheeler*, 160 Mass. 206, 35 N. E. R. 666.

sums of money which the testator had bequeathed to him.¹ On the other hand, the fact that the widow qualifies as the executrix of her late husband, takes possession of the land and sells under a power of sale conferred upon her as executrix, does not show an intention upon her part to take under the will, *as she acts solely as an executrix and not for herself individually.*² But where the widow, having been appointed executrix, in her account as such took credit for a balance of personal property retained *by the executrix according to the will*, it was held that she had elected to take under the will.³

§ 736. Not material that the testator supposed he owns the property devised.—It is not material, in determining whether a party is put to an election, that the testator, in disposing of that person's property, was in error as to its ownership, or that the testator in fact knew that he had no title to it. In either case if the party whose property is given away decides to take against the will, he must relinquish his legacy under the will. While the presumption is that a testator intends to give only his own property, his actual knowledge of his title or lack of title is usually unascertainable; and where accurate knowledge is impossible, speculation and conjecture are useless; "for," as was said by an eminent equity authority, "nothing can be more dangerous than to speculate upon what he would have done had he known one thing or another."⁴ The assertion of title by A., under a deed from B., conveying to A. land *which both believed belonged to P.* by inheritance from C., being ignorant of the fact that C. had, by will, devised it to A. as a separate estate (the will not having been discovered and admitted to probate till after the death of B.), does not estop A. from claiming the property under the will of C.⁵

§ 737. Election by infants and incompetent persons.—An infant, though he has a right, has no capacity to elect.⁶ Nor

¹ Coe's Appeal, 64 Conn. 352, 30 Atl. R. 140; Scholl's Appeal (Pa., 1889), 17 Atl. R. 206.

² Procter's Estate, 103 Iowa, 232, 237.

³ Fulton v. Moore, 25 Pa. St. 368.

⁴ By Sir R. P. Arden, in Whistler v. Webster, 2 Ves. Jr. 370. See also Thelluson v. Woodford, 13 Ves. 221; Gore v. Stevens, 1 Dana (Ky.), 201, 204; Weeks v. Weeks, 77 N. C. 421, 424.

⁵ Raspberry v. Harville (Ga.), 16 S. E. R. 299. See also Whistler v. Webster, 2 Ves. Jr. 367, 370; Welby v. Welby, 2 Ves. & Bea. 190, 199; Whitley v. Whitley, 31 Beav. 173; Coutts v. Ackworth, L. R. 9 Eq. 519; Boscawen v. Scott, L. R. 26 Ch. Div. 358.

⁶ Hamblett v. Hamblett, 6 N. H. (1832), 333; Robertson v. Stevens, 1 Ired. (36 N. C., 1841), Eq. 247, 251; Mo-

can his guardian elect for him, unless permitted to do so by a decree or order of a court having jurisdiction, which will be granted only upon proof of the facts showing a necessity that an election shall be made in this manner.¹

An insane person or an habitual drunkard is incapable of electing, nor can his committee or guardian act for him in this respect, for the exercise of this right involves the exercise of a discretion which is beyond the general powers of the committee. When, however, it becomes necessary that a person who has not capacity to elect shall have an election made for him, a court of probate or a court of equity will, upon the presentation of a petition and proper proof of the essential facts, order a reference for the purpose of ascertaining if a necessity for an election exists; and also to determine how it shall be made so that it shall result most advantageously for the incompetent person. Having been placed in full possession of the facts, the court will by its officers elect for the person entitled.² The same rule would be applied to the case of a lunatic or habitual drunkard under the charge of a committee.³

In equity a married woman has always possessed capacity to elect, and when she has made an intelligent election with a full understanding of her rights and of the value of the property involved, a court of equity will direct a proper conveyance to be made by her. If there is any doubt as to the circumstances of the election, or if the facts show that she is not in a position to make a free and intelligent choice, or one which will be for her best interests, a court of equity ought to order a reference to ascertain what will be most beneficial for her,

Queen v. McQueen, 2 Jones' Eq. (N. C.) 16; *Tiernan v. Rowland*, 15 Pa. St. 429.

¹ *Bassett v. Durfee*, 87 Mich. 167, 49 N. W. R. 558; *Huston v. McCune*, 24 Ohio St. 11; *Tomlin v. Jayne*, 14 B. Mon. (Ky.) 162; *Addison v. Bowie*, 2 Bland Ch. (Md.) 606, 623; *McQueen v. McQueen*, 2 Jones' Eq. (55 N. C., 1854), 16; *Grettan v. Haward*, 1 Sw. 409, 413.

² *Andrews v. Bassett*, 92 Mich. 449, 52 N. W. R. 743; *Weeks v. Weeks*, 77 N. C. 421, 424; *Van Steenwyck v. Washburn*, 59 Wis. 483; *Addison v.*

Bowie, 2 Bland Ch. (Md.) 606, 623; *Flippin v. Banner*, 2 Jones (N. C., 1856), Eq. 450; *Chetwynd v. Fleetwood*, 1 Bro. P. C. 300; *Goodwyn v. Goodwyn*, 1 Ves. 228; *Bigland v. Huddleston*, 3 Bro. C. C. 285, n.; *Gretton v. Haward*, 1 Swanston, 409, 413; *Ebrington v. Ebrington*, 5 Madd. 117; *Brown v. Brown*, L. R. 2 Eq. 481; *Griggs v. Gibson*, L. R. 1 Eq. 655; *Blunt v. Lack*, 26 L. J. Ch. 148.

³ *In re Marriott*, 2 Moll. 516; *Kennedy v. Johnson*, 65 Pa. St. 451; *Young v. Boardman*, 97 Mo. 181.

and she will be decreed to elect accordingly.¹ The *femme coverte* having made an intelligent election is bound thereby in the absence of fraud or mistake, and cannot subsequently renounce the property she has taken.²

§ 738. **The doctrine of election in relation to the claims of creditors.**—A case for an election did not arise when, prior to the passage of the statute making real property assets for the payment of the simple contract debts of the testator, the testator devised lands for the payment of his simple contract debts and bequeathed his personal property to others. The creditor was not compelled to elect between the land which had been devised for the purpose of paying his claim and the personal property, which by the law was also assets in the hands of the executor for that purpose. He might exhaust the land thus devised and then have any deficiency made up out of the personal property bequeathed.³

§ 739. **Election between gifts by the same will.**—The doctrine of election, as the term is used in equity, has relation to a choice between a gift under the will and a claim against it. The term may sometimes be used in a restricted sense, as indicating a choice between two legacies given to one person by the same will. In this latter case the property is owned wholly by the testator. In giving two gifts he may express his intention that the legatee shall not have both, but shall select. Thus a testator may, in giving property by his will, direct that the legatee shall be permitted to choose in what form or character he may take it.⁴ And generally, where several pieces of prop-

¹ *Robertson v. Stephens*, 1 Ired. Eq. (N. C.) 247, 251; *Pulteney v. Darlington*, 7 Bro. P. C. 546, 547; *Vane v. Lord Dungannon*, 2 Sch. & Lef. 118, 133; *Davis v. Page*, 9 Ves. 350; *Cooper v. Cooper*, 7 H. L. Cases, 53, 67, 79, L. R. 6 Ch. App. 15, 21; *Wilson v. Townshend*, 2 Ves. Jr. 693, 697; *Porsons v. Dunne*, 2 Ves. 60; *Robinson v. Buck*, 71 Pa. St. 386.

² *Ardesoife v. Bennet*, 2 Dick. 463; *Wilder v. Piggott*, L. R. 22 Ch. D. 263; *Barrow v. Barrow*, 4 Kay & J. 409, 18 Beav. 529; *Sisson v. Giles*, 11 W. R. 558, 32 L. J. (N. S.) 606; *Smith v. Lucas*, L. R. 18 Ch. D. 531; *In re*

Quead's Trusts, W. N. 1885, p. 99; *Frank v. Frank*, 3 My. & Cr. 171. See as to the power of a married woman to relinquish a reversionary right in action, *Whittle v. Henning*, 2 Phil. 731; *Robinson v. Wheelwright*, 6 De Gex, Mac. & G. 535, 546; *Williams v. Mayne*, 1 Irish R. Eq. 519; *Robertson v. Stephens*, 1 Ired. Eq. (N. C.) 247, 251; *Tiernan v. Roland*, 15 Pa. St. 430, 432.

³ *Kidney v. Coussmaker*, 12 Ves. 136; *Clark v. Guise*, 2 Ves. Sr. 617.

⁴ *Baum v. Bowen* (S. C., 1898), 31 S. E. R. 338; *Ridgway v. Manifold*, 39 Ind. 58, 63.

erty are given to a legatee, some of which are incumbered while others are not, he is at liberty to elect between them, and to reject that which is incumbered while accepting that which is beneficial. Thus, for example, in the case of a legacy, and also a gift of shares in a company which failed after the death of the testator, and the shareholders were called upon to contribute, a legatee of the shares may relinquish his legacy of shares and retain that of money.¹ But in this case as in all others the intention of the testator must control, and if it appears plainly that he meant the legatee to take the burdensome with the beneficial legacy he must take both or relinquish both.²

§ 740. Election in the case of a will devising land in different states.—A case for an election by the heir under a will which is in part inoperative may arise under the following circumstances: The testator owning lands which are located in two or more states or countries makes a will devising his lands away from his heir and also giving the heir a benefit; and the will is valid according to the laws of one state so that the heir receives his legacy, but it is invalid according to the laws of another state in which the land is located, in consequence of which invalidity the land which was attempted to be devised away from the heir descends to him. The question is discussed by the English authorities from the standpoint of a will validly executed to pass land according to the formalities of the English statutes which attempts to disposed of land located in Scotland, but which is inoperative to pass that land because not executed with the formalities required in the latter country. In the United States the question would arise when a will, for example, executed in New York, with an attestation by two

¹ Talbot v. Lord Radner, 3 My. & K. 252, 254; Warren v. Rudall, 1 Jo. & Hem. 1, 13; Green v. Britten, 42 L. J. Ch. 187; Andrew v. Trinity Hall, 9 Ves. 525; Fairclough v. Johnstone, 16 Ir. Ch. 442; Aston v. Wood, 22 W. R. 893; Syer v. Gladstone, L. R. 30 Ch. D. 614. Testator devised lands to his two daughters with the direction that they should pay \$3,000 to a third daughter, and if they did not pay this, the third daughter was to

receive a portion of the land given to the other two daughters. It was held that the two daughters who had been directed to pay the money should elect between doing so and surrendering a portion of the land to the third daughter. Damuth v. Lee, 51 N. Y. S. 648, 29 App. Div. 26; Moffett v. Bates, 3 Sm. & Gif. 468.

² Talbot v. Earl of Radnor, 3 My. & K. 252, 254; Story, Eq. Jur., § 1091.

witnesses, which is valid to pass land located there, purports to devise land located in another state or commonwealth where three or more witnesses are required for a devise.

In determining the question whether the heir of the testator must be compelled to elect between what the partially invalid will gives him and what he takes by reason of the fact that it is in part invalid, and the testator to that extent intestate, it must in the first place be determined whether the testator meant the will to dispose of all his land, wherever it may be located, or whether he meant to dispose of only his land or other property which is situated in the state or country in conformity with whose testamentary law the will is operative. In the former case, as where, for example, the testator devises "*all my land or my real property, of whatever sort and wherever located,*" the intention of the testator to dispose of all his land is so clearly apparent that the heir is put to an election. He must then elect between what the will gives him so far as it is valid, and what he takes by descent so far as the will is inoperative. If the heir receives a legacy under a will which is valid to pass property in one state, he cannot claim to defeat its operation upon land located in another state by proving that it is not executed in conformity to the laws of the latter state. He cannot take land by descent because the will is improperly executed according to the law of the state in which the land is located.¹

But the English cases have, in construing English wills which purport to dispose of lands in Scotland, reversed this presumption. If the will purports to dispose of the land of the testator "*of whatsoever nature and wheresoever located,*" the Scottish heir will not be put to his election, for it will be presumed that the testator meant to include only such property wherever located as the will would operate upon.² On the other hand, where the testator disposes of his lands by some particular designation describing their locality, as by stating that they are located in Scotland,³ or devises his lands "in any part of the

¹In *re Cumming's Estate*, 25 Atl. Maxwell v. Maxwell, 16 Beav. 102, R. 1125, 153 Pa. St. 377 (1893), 22 W. 106.
N. C. 172.

²*Brodie v. Barry*, 2 Ves. & B. 127;

³*Johnson v. Telford*, 1 R. & My. Reynolds v. Torin, 1 Russ. 129; *Mc-244*; *Allen v. Anderson*, 5 Hare, 163; *Call v. McCall*, 1 Dru. 283.

United Kingdom," the person who will take the Scotch lands as heir because the will is improperly executed must elect between them and a legacy given him by the same will.¹

¹ In the case of *Van Dyke's Appeal*, 60 Pa. St. 489, a testator bequeathed to his two daughters legacies which exhausted his estate located in Pennsylvania and devised to his two sons all his New Jersey lands. The will, being executed in the former state, was valid by the laws of that state, but invalid to pass the lands located in New Jersey. The daughters were put to an election between their legacies and the shares which they would take as heirs in the New Jersey property. And the court ordered that the daughters should pay out of the personal property they received under the will a sum equal in value to what they would take as heiresses of the testator in the New Jersey lands. In this case there was an express direction that the heirs of the testator should take no exception to the will, but the court disregarded this in reaching its decision, and placed its ruling upon the broad ground that a condition should in such cases be implied. The court, by Judge Sharswood, said: "It may certainly be considered as settled in England, that if a will purporting to devise real estate, but ineffectually, because not attested according to the statute of frauds, gives a legacy to the heir at law, he cannot be put to his election. (*Hearle v. Greenbank*, 8 Atk. 695; *Thelluson v. Woodford*, 13 Ves. 209; *Buckridge v. Ingram*, 2 id. 652; *Sheddon v. Goodrich*, 8 id. 482.) These cases have been recognized and followed in this country. (*Melchor v. Burger*, 1 Dev. & Batt. 634; *McElfresh v. Schley*, 2 Gill, 181; *Jones v. Jones*, 8 Gill, 197; *Kearney v. Macomb*, 1 C. E. Green, 189.) Yet it is equally well settled that if the testator annexed

an express condition to the bequest of the personalty, the duty of election will be enforced. (*Boughton v. Boughton*, 2 Ves. Sr. 12; *Whistler v. Webster*, 2 Ves. 367; *Ker v. Wauchope*, 1 Bligh, 1; *McElfresh v. Schley*, 2 Gill, 181.) That this distinction rests upon no sufficient reason has been admitted by almost every judge before whom the question has arisen. Why an express condition should prevail, and one however clearly implied should not, has never been and cannot satisfactorily be explained. It has been said that a disposition absolutely void is no disposition at all, and, being incapable of effect as such, it cannot be read to ascertain the intent of the testator. But an express condition annexed to the bequest of the personalty does not render the disposition of the realty valid. It would be a repeal of the statute of frauds to hold so. How, then, can it operate, any more than an implied condition, to open the eyes of the court, so as to enable them to read those parts of the will which relate to the realty; and without a knowledge of what they are, how can the condition be enforced? . . . We are equally clear that this is a case of election. The intention of the testator does not rest merely upon the implication arising from the careful division of his property among his children in equal classes, but he has indicated it in words by the clause: 'I direct and enjoin my heirs that no exception be taken to this will, or any part thereof, on any legal or technical account.' It is true that, for want of a bequest over, this provision would be regarded as *interrorem* only, and would not induce a forfeiture. . . . But the doctrine

§ 741. Cases of election under powers of appointment.—A case for an election arises where the testator, having an exclusive power to appoint by will, to be exercised *only in favor of particular objects*, exercises it in favor of a stranger to the power, and *in the same will* gives property *absolutely his own to the object of the power*. The appointment to the stranger being in excess of the power is invalid, and it will be set aside by equity in favor of those who would take by default on a total failure to appoint. If, then, the testator in a will which attempts an illegal execution of the power gives property *of his own* to those who take in default of a valid appointment, who, in the case of an exclusive power, are the objects of the power, such persons must elect. They cannot take the property owned by the testator and which he has given them in the will, and also take by default of appointment against the will.¹

But in order to create a case for an election it is always absolutely necessary that the testator should give property of his own to the disappointed objects of the power; for, if this be not done, there is nothing for them to elect between. Thus an election is not required to be made between two appointments by will made under limited powers disposing of separate funds, for under such circumstances the testator, in appointing, *has disposed of no property absolutely his own*. Hence where a person has one power to devise one fund to *one or more of his children*, and a separate and distinct power to divide another fund by his will among *all* his children, and he validly executed the former power by giving all to one child, A., but gave the fund embraced in the second power (which he should have divided among *all* his children) to two of them, it was held that A., while retaining what had been devised to him in exe-

of election rests upon the principle of compensation, and not of forfeiture, which applies only to the non-performance of an express condition. Besides, no decree of this court could authorize the guardians of the minors to execute releases of their rights and titles to the New Jersey lands which would be effectual in that state."

¹ Whistler v. Webster, 2 Ves. 367, 370; England v. Lavers, L. R. 3 Eq.

63; Tomkyns v. Blane, 28 Beav. 422, 423; Reid v. Reid, 25 Beav. 469; Ex parte Barnard, 6 Ir. Ch. R. 185; In re Fowler's Trusts, 27 Beav. 862; Armstrong v. Lynn, 6 Ir. R. Eq. 186. "Thus where a person has a power to appoint to two, and he appoints to one, and gives the other a legacy, that is a case of election." Sugden on Powers, 589 (8th ed.); Bristowe v. Ward, 2 Ves. Jr. 836.

cution of the former power, could also take a share under the second power as in default of an appointment.¹ So, too, in order that an election may be required, it is necessary that the testator should dispose of another's property. An attempt on the part of the testator to execute a power to devise in violation of legal rules, in consequence of which the execution is invalid, does not create a case for election. Hence, where he appoints by his will to a stranger in a mode which is invalid for remoteness, and by the will gives a legacy to the object of the power, the latter need not elect, for, the appointment being absolutely invalid, the court will read the will as though it was not in it.²

No necessity for an election exists where the testator in the valid execution of a power by will gives the property absolutely, but adds to the execution precatory language not disposing of the property appointed, but requesting the objects of the power to devote a portion of the property to the benefit of a stranger. Where it is the duty of the testator under the power which he possesses to give property absolutely to A., he cannot put A. to an election by giving him that property in trust for B., or coupled with a request that he apply it to the benefit of B. and giving A. property of his own absolutely.³

§ 742. Election among tenants in common and between the life tenant and remaindermen.—Where property not belonging to the testator, but which is disposed of in his will,

¹ *Aplin's Trusts*, 13 W. R. 1062; *Fowler's Trust*, 27 Beav. 362.

² *Wollaston v. King*, L. R. 8 Eq. 165, 175; *In re Warren's Trusts*, L. R. 28 Ch. D. 208, 219. A case for election does not arise where the testator having a power of devising property which, in default of execution, will go to A., refrains from executing it under a mistaken belief that the property in default of appointment will go to B., and in his will expressly so stating, gives other property to A. A. is not compelled to elect. *Langslow v. Langslow*, 21 Beav. 552; *Box v. Barrett*, L. R. 3 Eq. 244.

³ *King v. King*, 15 Ir. Ch. Rep. 479; *Kampf v. Jones*, 2 Keen, 756; *Carver*

v. Bowles, 2 Russ. & My. 301; *Blacket v. Lamb*, 14 Beav. 482; *Church v. Kemble*, 5 Sim. 525; *White v. White*, L. R. 22 Ch. D. 555; *Woolridge v. Woolridge*, 1 Johns. (Eng.) 63; *In re Warren's Trusts*, L. R. 26 Ch. Div. 208, 220. Where the testator, having made a valid appointment under a power, attempts to revoke it by a will which gives the property thus appointed to strangers, and, by the revoking instrument, gives property of his own to the objects of the power, a case for an election by the objects arises. *Cooper v. Cooper*, L. R. 6 Ch. App. 15, L. R. 7 H. L. 53; *Coutts v. Ackworth*, L. R. 9 Eq. 519.

belongs to others, who take in succession as tenants for life and remaindermen, the successive takers have a *separate right of election*. The remaindermen are not bound by the election of the life tenant.¹

Thus, where the testator gave a life estate to A., with remainder to his children, and provided that this legacy should be in satisfaction of all claims, either of A. or of his children, existing under certain marriage articles, A., upon electing to take under the will, forfeited his rights under the marriage articles, but his choice did not bind his children, who might take as remaindermen under the marriage settlement.² So, where several persons, who are entitled as tenants in common to property disposed of in the will, are compelled to elect, the minority are not bound by the majority; some may take under the will, others against it. If the person electing to take under the will is heir at law of the testator, he must relinquish everything given him by the will; while those who take against the will cannot take property disposed of by it.³

§ 743. The right of election does not inure to heir.—The right to elect is personal. It cannot usually be exercised by the heir or the personal representative of the person who was entitled to elect, though the latter dies before the expiration of the period allowed by the statute for an election.⁴

Thus, the statutory right to elect does not pass to the heirs of the widow, for their interests and hers are not identical, and the property which she might have taken if she had elected might never have come into the possession of her heirs. The person who had the right to elect, and his heirs or personal representatives, will often, of necessity, view their personal interests from different standpoints; for while to elect against the

¹ Long v. Long, 5 Ves. 465.

² Ward v. Baugh, 4 Ves. 623, 627.

³ Fytche v. Fytche, 19 L. T. (N. S.) 343, 344.

⁴ Donald v. Portis, 42 Ala. 29, 31; Fosher v. Guilleams, 120 Ind. 172, 175; Wilson v. Moore, 86 Ind. 244, 247; Church v. McLaren, 85 Me. 122, 126; Boone v. Boone, 3 Harr. & McH. (Md., 1791), 95; Hawkins v. Bohling, 168 Ill. 214, 48 N. E. R. 94, 96; Ather-ton v. Corlis, 101 Mass. 44, 45; Collins

v. Carman, 5 Md. 503; Crozier's Appeal, 90 Pa. St. 384; Jackson's Appeal, 126 Pa. St. 105, 107; Merrill v. Emery, 10 Pick. 507. In Welch v. Anderson, 28 Mo. 293, 299, it was held that a failure to notify the widow of her right to elect did not confer the right to elect upon her heir. But see *contra*, In re Proctor, 103 Iowa, 232, 239, 72 N. W. R. 516, as to widow's distributive share.

will may greatly benefit the widow, the reverse might be true with respect to her heirs or her next of kin. Thus, a life annuity given her by the will might be more valuable than what she would take by the law; yet, as the *annuity ceases with her life*, her heirs, in case of her death within the period during which she must elect, would prefer to take under the law. Again, the testamentary provision made for her may have been the result of a family agreement between her and her husband, which would not bind her heirs. Her acquiescence in it might have arisen out of respect for his wishes, or out of consideration for the needs of those whom he has made the objects of his favor, and these considerations might wholly fail to have any effect upon the minds of those who are her heirs or next of kin.¹ This is the general rule where the widow, or any other person having the right to elect, has an opportunity to exercise it before his death, and his failure to do so is not the result of the fraud² of others or of circumstances over which he has no control. But in some cases, where an election was prevented by fraud or by an unavoidable accident, the court has permitted an election after the death of the party. Thus, where a will calling for an election was not discovered until after the death of the person who, if living, would have had the right to elect, the court elected for his heirs as was most advantageous for them.³

Under particular circumstances it may be inequitable not to permit the heir or personal representative of a deceased person to elect. The case of an election by the widow in respect to her dower is *sui generis*; for, where she dies without an election made by her personally, her right to dower expires with her. No interest whatever in that passes either to her heir or to her next of kin, and as they are not deprived of any property by the will under which she would have been compelled to elect, if she had survived, they have no right of electing. They cannot be required to elect. But where any person who is bound to elect dies without having done so, and the property which the will bequeaths to him, and *also his property which the will has*

¹Sherwood v. Newton, 6 Gray (Mass.), 307, 309.

²Fosher v. Williams, 120 Ind. 172, 175.

³Spruance v. Darlington (Del., 1897), 30 Atl. R. 663. And see also Fytche v. Fytche, 19 L. T. (N. S.) 843, 844.

given to another, goes to his heirs or personal representatives, the latter ought to be compelled to elect, in fairness and justice to all concerned in the will. If both pieces of property devolve upon the same persons, as, for example, where both are personal property, passing to the legatees or next of kin of the person who had the right to elect, those persons must elect. Each of the next of kin has a separate right of election and is not bound by the act of the majority or of the administrator. But where, on the death of a person who has failed to elect, the property which he owns and the property which is given him goes to different persons under the law, as when the former is real property which goes to his heirs, and the other is personal property which goes to the executor of his will, there can be no election. The executor need not, because he cannot elect. Nor need the heir do so. But in such a case that person, whether the heir or the executor, to whom passes that property which the testator in the original will had the absolute right to dispose of, must compensate the persons who were disappointed under that will. Thus, for example, let us suppose A. shall devise to C. money which belongs to B., and bequeath to B. land which he (A.) owns absolutely. On the death of B. without making an election, B.'s money, which was attempted to be given to C., goes to B.'s personal representatives, and the land which A. gave B. goes to B.'s heir. But the latter is bound to make good to C. the legacy which was given to him in the will of A.¹

§ 744. **The doctrine of election in its application to the right of dower.**—Long before the creation of the doctrine of election in equity, courts of law in England had been accustomed to recognize a somewhat similar principle. It was a well recognized rule in law that if the wife accepted a jointure made for her during coverture by entering upon the land comprised in it, she would be estopped from claiming dower in all the lands of which her husband died seized.² So, also, in a case decided in the reign of Queen Elizabeth,³ it was held that the recovery of dower by a widow was a bar in an action brought

¹ *Pickersgill v. Rodger*, L. R. 5 Ch. 128; *Lacey v. Anderson*, Cases in D. 163, 175.

² 3 Leon. 373.

Chancery, 155; *Boynton v. Boynton*, 1 Bro. C. C. 445.

³ *Gosling v. Warburton*, Cro. Eliz.

by her to recover the provision made for her in her husband's will in lieu of dower. Thus it will be seen that the principle of election between inconsistent benefits, so far as it applies to the widow's dower, is not confined to courts of equity, nor did it have its origin there. But it is in equity that the doctrine of election in its relation to dower has received the fullest consideration and most abundant illustration. The right of dower is regarded with great favor both in law and in equity. The widow should, and usually does, receive the utmost consideration from the court. The presumption is, in the absence of a clearly contrary intention, that the testator, in devising property to her in his will, intends it as a bounty and not as a substitute for what she is entitled to of right. So it is a general rule in equity, as regards the widow's dower, that the court will not compel her to elect between her dower or other statutory right and interest which she may have in the estate of the testator, and a provision made for her in the will, unless, *first*, it shall appear *in express terms* that the bequest or devise was given in lieu or satisfaction of her dower; or *second*, unless it appears by clear and manifest implication on the circumstances of the case that the testator intended her to elect. She will not be compelled to elect unless her claim of dower is plainly inconsistent and irreconcilable with the will of the testator and so repugnant to it that *both her claim of dower and the devises in the will cannot consistently be upheld*. She has a right to take both, despite the fact that the benefit given by the will may be much greater in fact than her dower.¹

¹ McLeod v. McDonnell, 6 Ala. 236, 239 (1844); Hilliard v. Binford, 10 Ala. 977; Apperson v. Bolton, 29 Ark. 418, 426; Lord v. Lord, 23 Conn. (1854), 327; Alling v. Chatfield, 42 Conn. (1875), 276; Nelson v. Pomeroy, 64 Conn. 257, 29 Atl. R. 534; Anthony v. Anthony, 55 Conn. 256, 258, 11 Atl. R. 45; Chandler v. Woodward, 3 Harr. (Del.) 428; Warthen v. Pearson, 33 Ga. 385; Tooke v. Hardeman, 7 Ga. 20 (1849); Jennings v. Smith, 29 Ill. 116 (1862); Brown v. Pitney, 39 Ill. 468; Sturgis v. Ewing, 18 Ill. 176; Mowbry v. Mowbry, 64 Ill. 383; Warren v. Warren, 148 Ill. 641, 36 N. E. R. 611; Collins v. Woods, 63 Ill. 285; Smith v. Baldwin, 2 Ind. 104; Kelly v. Stinson, 4 Blackf. (Ind.) 387; Ragsdale v. Parrish, 74 Ind. 191, 196; O'Harrow v. Whitney, 85 Ind. 140, 142; Wilson v. Moore, 86 Ind. 244, 247; Burley v. McIver, 119 Ind. 53, 57; Like v. Cooper, 132 Ind. 391, 31 N. E. R. 1118; Richards v. Richards, 90 Iowa, 606, 58 N. W. R. 926; Parker v. Hayden, 84 Iowa, 493, 496; Howard v. Watson, 76 Iowa, 229, 230; Mitteer v. Wiley, 34 Iowa, 214; Baldwin v. Hill, 97 Iowa, 586, 66 N. W. R. 889; Franke v. Wiegand, 97 Iowa, 704, 66 N. W. R. 918; Sully v. Nebengall, 30 Iowa, 340; Daugherty v.

Where the widow is *not* put to an election, either expressly or by manifest implication, those to whom the testator has devised the land must take it *subject to her dower*. Nor does it follow because the value of the property thus devised is ulti-

Daugherty, 69 Iowa, 679, 29 N. W. R. 778; In re Blaney, 73 Iowa, 113, 114, 34 N. W. R. 768; Howard v. Smith, 78 Iowa, 73, 78, 42 N. W. R. 585; Severson v. Severson, 68 Iowa, 656, 657, 27 N. W. R. 811; Bailey v. Duncan, 4 Mon. (Ky.) 256, 265; Shaw v. Shaw, 2 Dana (Ky.), 242; Knighton v. Young, 22 Md. 359; Adams v. Adams, 5 Met. (Mass.) 277, 279; McGowen v. Baldwin, 46 Neb. 477, 49 N. W. R. 251; Smith's Appeal, 60 Mich. 136, 27 N. W. R. 136; Fulton v. Fulton, 30 Miss. 596; Godman v. Converse, 43 Neb. 463, 61 N. W. R. 756; Brown v. Brown, 55 N. H. 106; Gray v. Gray, 16 Misc. R. 226, 39 N. Y. 7; Morgan v. Titus, 8 N. J. Eq. 201; Norris v. Clark, 10 N. J. Eq. 51; Colgate v. Colgate, 23 N. J. Eq. 272; Hasenritter v. Hasenritter, 77 Mo. 162; Schwatken v. Dandt, 53 Mo. App. 1, 3; Adsit v. Adsit, 2 Johns. Ch. (N. Y.) 448; Stewart v. Stewart, 31 N. J. Eq. 398, 408; Savage v. Burnham, 17 N. Y. 561, 577; Tobias v. Ketchum, 32 N. Y. 319, 326; Dodge v. Dodge, 31 Barb. (N. Y.) 413; Jackson v. Churchill, 7 Cow. (N. Y.) 287; Leonard v. Steele, 4 Barb. (N. Y.) 20; Mills v. Mills, 28 id. 454; Lasher v. Lasher, 13 Barb. (N. Y.) 106; Nelson v. Brown, 144 N. Y. 384; Church v. Bull, 2 Denio, 430; Larrabee v. Van Alstine, 1 Johns. (N. Y.) 370; Smith v. Kniskern, 2 Johns. Ch. 448; Konvalinka v. Schlegel, 104 N. Y. 225, 9 N. E. R. 868; Closs v. Eldert, 51 N. Y. S. 881; Wood v. Wood, 5 Paige (N. Y.), 597, 601; Fuller v. Yeates, 8 id. 325; Sanford v. Jackson, 10 id. 266; In re McDonald's Estate, 2 Ohio N. P. 232; Webb v. Evans, 1 Binn. (Pa., 1809), 565, 573, 1 Yeates, 424; Sample v. Sample, 2 Yeates (Pa.), 433; McCullough v. Allen, 3 Yeates (Pa.), 10; Hamilton v. Buckwalter, 2 Yeates,

389; Cauffman v. Cauffman, 17 S. & R. (Pa.) 16, 25; Callahan v. Robinson, 30 S. C. 249, 9 S. E. R. 120; Sumerel v. Sumerel, 34 S. C. 85, 12 S. E. R. 932; Rivers v. Gooding, 43 S. C. 428; Gordon v. Stevens, 2 Hill, Ch. (S. C.) 48; Crown v. Caldwell, Speers' Ch. (S. C.) 322; In re Hatch, 60 Vt. 160, 18 Atl. R. 814; Turner v. Scheiber, 89 Wis. 1, 61 N. W. R. 280; Melms v. Pabst, 93 Wis. 140, 149; Herbert v. Wren, 7 Cranch, 370; Dundas v. Hitchcock, 12 How. (U. S.) 256; United States v. Duncan, 4 McLean, 99. Where the testator, after devising land charged with the support of his widow out of the rents and profits, gave her all the cash on hand at his death, it was held that the lands devised were subject to dower, and that the widow need not elect. Rivers v. Gooding, 43 S. C. 428, 21 S. E. R. 310. It is necessary in order that the acts of the widow may be equivalent to an election under the will, and a waiver of her rights in her husband's estate which she enjoys under the law, that she shall act with a full knowledge of her rights, and of all the conditions and circumstances of her husband's estate. It must affirmatively appear that she intended by her actions to waive her right of dower and to accept the testamentary provision. These acts must be plain and unequivocal in order to constitute an election. Her mere acquiescence in the existing condition of affairs, without an intelligent and deliberate choice, is not a valid election which will estop her from claiming both under the law and under the will. Milliken v. Welliver, 37 Ohio St. 460; Sill v. Sill, 31 Kan. 248, 256.

mately diminished by the assertion of her right that she is compelled to elect. Any implication of an intention on the part of the testator that his widow shall elect between the will and her dower right in his real property must clearly appear. The provisions of the will, *where the direction that she shall elect is not express*, must be clearly inconsistent with the assertion of her dower right in his lands. The intention of the testator to put his widow to an election must be ascertained from the language of the will, for it is not for the court to speculate what the testator *might* have thought or done if the question of his wife's dower had been called to his attention while he was executing his will. In the majority of cases where there is no express direction that the devise shall be in lieu of dower, it is probable that the testator had no clear conception of the rule under which his wife, if not compelled to elect by the terms of the will, might claim both dower and the testamentary benefit. The rules and principles of election, so extremely technical in their character, are not within the knowledge of testators generally; and in the majority of cases, where a will is framed without professional assistance, the testator is probably unaware of the right of his widow to claim her dower and also what he gives her in the will. But these considerations have no weight against the presumption that every one is bound to know the law, and they are therefore not to be taken into account by the court.¹

¹In *Sanford v. Jackson*, 10 Paige, 268, Walworth, C., says: "The common-law principle upon which the widow is compelled to elect between her dower and a provision made for her in the will of her deceased husband is well settled, and the only difficulty arises in applying it to the varying circumstances of each particular case. Where the testator in terms declares that the provision made in favor of the wife is in lieu of dower, if she accepts the provision she cannot have her dower in the testator's estate also, even in those cases where the assignment of her dower would not interfere with any other provision of the will, ex-

cept such declared intent of the testator. . But to bar her of her dower by implication, where the testator has not declared his intention on the subject by his will, the provisions of the will, or some of them, must be absolutely inconsistent with her claim of dower; so that the intention of the testator will be defeated, as to some part of the property devised or bequeathed to others, if she takes her dower as well as the provision made for her in the will. . . . And to deprive the wife of her dower, or to compel her to elect, it is not sufficient that the provision of the will render it doubtful whether the testator intended she should have her

§ 745. A general devise of land to the widow or a devise of all the lands of the testator in trust to sell does not bar dower.—It is well settled, in the absence of a statute enacting that every devise of land to the widow of the testator shall be presumed to be in lieu of dower, that a mere devise *in general terms of a part of the real estate* of the testator to his widow does not prevent her from claiming dower in the residue. The same is true, *a fortiori*, of a money legacy, and in either case it is not material to raise a case for an election that the testamentary provision for the widow is to cease with her marriage.¹ And even if the testator has given *all his real property* to be enjoyed jointly by his wife with others, she is not prevented from claiming her dower in the shares of the others so far as it is possible to ascertain it.

All the cases sustain the rule that a devise of lands to trustees for the purpose of sale, whether to pay debts or legacies, is not enough, taken alone, to bar dower in the lands thus devised. If the testator had conveyed or attempted to convey his lands during life, his wife must have joined in the deed of conveyance in order that the purchaser might secure a clear title. There is nothing in the creation of a trust to sell lands which indicates that the testator intended his trustees to possess a greater power than he possessed himself. He intended his lands to be sold; and, in the absence of a contrary expression of intention, it will be presumed that he intended them to be sold subject to all their usual incidents, including dower, as they would have been had he himself conveyed them.² The

dower, in addition to the provision made for her by the will; but the terms and provisions of the will must be such as to show an evident intention on the part of the testator to exclude the claim of dower."

¹Lawrence v. Lawrence, 2 Vern. 365, 1 Eq. Cas. Abr. 218; Hitchin v. Hitchin, Pre. Ch. 138, 2 Vern. 403.

²Ellis v. Lewis, 3 Hare, 310, 313; Gibson v. Gibson, 1 Drew. 42, 57; Bending v. Bending, 3 Kay & J. 257; Church v. Bull, 2 Denio (N. Y., 1845), 430; Adsit v. Adsit, 2 Johns. Ch. (N. Y., 1817), 448; Fuller v. Yates, 5 Paige (N. Y.), 601; Tobias v. Ketchum,

32 N. Y. 319; Lewis v. Smith, 9 N. Y. 502; Savage v. Burnham, 17 N. Y. 561, 577; Wood v. Wood, 5 Paige (N. Y.), 601; Bull v. Church, 5 Hill (N. Y.), 207; Vernon v. Vernon, 53 N. Y. 351, 363; Gordon v. Stevens, 2 Hill (S. C.), Ch. 46; Hall v. Hall, 8 Rich. (S. C.) Eq. 407; Herbert v. Wren, 7 Cranch (U. S.), 370, 379. And see also Lemon v. Lemon, 8 Vin. Abr., Dower, p. 336, pl. 45; French v. Davies, 2 Ves. Jr. 572; Dowson v. Bell, 1 Keen, 761; Strahan v. Sutton, 3 Ves. 249; Incledon v. Northcote, 3 Atk. 430, 436; Brown v. Barry, 2 Dick. 685. In Kenvalinka v. Schlegel, 104

rule is not varied where the direction of the trustees to sell lands is coupled with a power to convey a good title; for the trustees could not, in any event, convey any title except that which the testator had in his life, which was subject to dower during coverture.¹

The question also arises whether the fact that the widow is to receive a substantial provision out of the proceeds of the land he has ordered to be sold will bar her dower in them. The general rule is applicable to these cases. If the provision for the widow out of the proceeds of the land is such that to permit her to receive it, and also to recover her dower in the property which has been sold, would be inconsistent with the whole will and tend to defeat some substantial provision of it, it may be presumed that the testator intended her to elect.² Thus, if the residue of the proceeds, after the deduction of the widow's legacy, has been bequeathed for the support of a minor child for whom no other provision has been made, and who would be deprived of his support if the widow is not compelled to elect, it will be presumed that the legacy was in lieu of dower.³

A distinction which is rather technical has been made by the English decisions between a case in which property is given in trust to sell only, and a case where it is given to the trustee with a power to lease from year to year or for a term of years. In the latter case the English chancellors held that the widow must relinquish her dower right in the lands. The impossibility of leasing lands for any lengthy period of time under circumstances where the widow would have the legal right to demand that a third part of the lands leased should be set out by metes and bounds during her life raises a presumption that

N. Y. 225, 9 N. E. R. 868, the testator, after dividing his household furniture between his wife and children, gave the residue of his estate, both real and personal, to executors to sell and divide among his wife and children. The court held that the widow might claim dower in all the real property without relinquishing her share of the proceeds. In *Kimbel v. Kimbel*, 43 N. Y. S. 800, 14 App. Div. 570, the same rule was applied to a

bequest of the residue with a power of sale to be exercised only if necessary.

¹*Kinsey v. Woodward*, 3 Harr. (Del.) 459, 466.

²*Ellis v. Lewis*, 3 Hare, 310; *Parker v. Downing*, 4 L. J. Ch. 198.

³*Herbert v. Wren*, 7 Cranch, 370, 378; *Colgate v. Colgate*, 23 N. J. Eq. 379; *Chalmers v. Storil*, 2 Ves. & B. 222.

the testator intended the lands should be free from dower. While a person might be willing to purchase lands subject to a right of dower which the widow could release, and which, as it is less than the value of the fee, would not, if enforced, result in his eviction, he would hardly be willing to lease such lands incumbered by her right, the assertion of which would be equivalent to his eviction.¹

The fact that land in which the widow has a right to have dower assigned to her is devised to a person to be used in such a manner as will be absolutely inconsistent with the enforcement of her claim of dower is a circumstance which is often conclusive that the testator intended that she should elect. In an English case, where a house was devised to the widow for her use for life at a specified yearly rent, and she was directed to keep the house in repair, and the residue of the land of the testator was devised to strangers, it was held that the widow could not enjoy the life estate devised to her and have dower assigned her in the same.² The fact that she was to have the personal enjoyment of the house, being absolutely inconsistent with her right to have a third of the property set out by metes and bounds, is a sufficient indication that she must elect, although the life estate was not given to her expressly in lieu of dower.³

¹ Hall v. Hill, 1 D. & War. 94, 1 C. & L. 120; O'Hare v. Chaine, 1 J. & Lat. 652, 662; Parker v. Sowerby, 4 De Gex, M. & G. 321, 1 Drew. 488; Grayson v. Deakin, 3 De Gex & S. 298; Linley v. Taylor, 1 Gilf. 67; Lowes v. Lowes, 5 Hare, 501; Pepper v. Dixon, 17 Sim. 200; Reynard v. Spence, 4 Beav. 103; Sullivan v. Mara, 48 Barb. (N. Y.) 523. A gift in trust of real property for the term of one year, at the expiration of which it is to be turned over to the widow for her natural life, or as long as she remains unmarried, the trustees having the power to sell and give a good and sufficient deed with a devise of the residue of the estate, absolutely or in fee, shows a clear intention that the widow shall elect between this provision and her dower. Cooper v. Cooper (N. J., 1897), 38 Atl. R. 198.

² Birmingham v. Kirwan, 2 Sch. & Lef. 444.

³ In this case Lord Redesdale said: "The result of all the cases of implied intention seems to be that the instrument must contain some provision inconsistent with the assertion of a right to demand a third of the land to be set out by metes and bounds. . . . Now in the present case it is clear the assertion of a right to dower as to the house and demesne would be inconsistent with the disposition of the house and demesne contained in the will, and therefore the widow cannot have both. The house and demesne are devised with the rest of the estate to trustees. That devise taken simply might be subject to the widow's right of dower, but it is coupled with a direction that she shall have the

§ 746. **Presumption of an election by the widow from equality of division.**—We will suppose that the testator has divided all his property, both real and personal, between his widow and another person equally. The question then arises, is the widow entitled to her moiety, and also to her dower in the real property which is given to the other person, or does the intention to make an equal division raise a conclusive presumption that the testator intended she should accept one-half in satisfaction of her dower right in the other? In an English case, where the testator said: “I give to my wife A., and my two children, all my estates whatsoever, to be *equally divided among them*, whether real or personal,”¹ it was held that

enjoyment of the house and demesne, paying a rent of 13s. per acre, which must be out of the whole. Then follow directions that she shall keep the house in repair, that she shall not alien, except to persons in remainder; directions which apply to the whole of the house and demesne, and could not be considered obligations on a person claiming by dower. . . . Then comes the question whether the implication extends to the rest of the estate. I cannot, on the whole of the case, think the testator has sufficiently manifested an intent that this beneficial interest in the house and demesne, given upon a reserved rent and under certain conditions, should be considered as a bar of dower out of the rest of the estate. The will may be perfectly executed as to all other purposes without injury to the claim of dower; with respect to the rest of the estate it may be mortgaged or sold subject to that claim.” “In the case of *Ellis v. Lewis*, 3 Hare, 310, the provisions of the will were substantially as those in *Colgate’s* will. The testator devised all his real estate to a trustee in trust to sell and invest the proceeds, and to pay the income arising from one moiety of it to his wife during widowhood, and to pay the income of the other moiety and of the whole after the death or remarriage

of the widow to his sister. Sir James Wigram held that the devise should not be held inconsistent with and in lieu of dower, and that the widow was not put to her election. He notices the three cases above mentioned (*Chalmers v. Storil*, 2 V. & B. 22; *Dickson v. Robertson*, Jacob, 503; *Roberts v. Smith*, 1 Sim. & Stu. 513), and held that his determination did not conflict with them, supposing that these cases did not intend to overrule the doctrine well established, that a mere devise of land in trust for sale did not import an intention to devise it otherwise than in lieu of dower. He does not seem to have realized that the decision in those cases was based upon the fact that the disposition of the proceeds was inconsistent with her claim for dower, and showed an intention that this was in lieu of dower. He holds, without reference to authority, that the direction to divide the proceeds of the sale cannot decide what the subject of the sale is. I am inclined to consider the judgment of Sir William Grant, Sir John Leach and Sir T. Plumer as of more authority than that of Vice-chancellor Wigram, standing as it does alone.” For the court by Chancellor Zabriskie in *Colgate v. Colgate*, 23 N. J. Eq. 379.

¹ *Chalmers v. Storil*, 2 Ves. & Bea. 222. “The testator directing all his

the equality of division intended to be effected by the will was absolutely inconsistent with a claim of dower. The testator evidently meant by this language to divide his real property equally, which intention would not be carried out if the widow was not really compelled to relinquish her dower. This rule has been criticised upon the ground that a testator will be presumed to have intended to dispose of his own property only, and where he directs an equal division of his property he will be presumed to have intended to divide equally such property only as he had an absolute power to dispose of, *i. e.*, his real estate less the dower interest.¹ Despite this criticism of the rule it has been followed both in England² and in America.³

It is well settled in the absence of statute that a mere devise in general terms does not put the widow to her election.⁴ A gift of a money legacy to the widow with a devise of a part of the lands of the testator, without any expression of intention that this is to be received in lieu of dower, does not put her to an election.⁵ Whether the gift of an annuity or of a rent charge for life to be paid out of the income of real estate will operate as a bar to dower has been much debated. In some cases it has been held that a gift of an annuity payable during life or widowhood, with a devise of the land subject to the

real and personal estates to be equally divided, the same equality is intended to take place in the division of the real as of the personal estate, which cannot be if the widow first takes out of it her dower and then a third of the remaining two-thirds." Remarks of Sir William Grant, M. R., in *Chalmers v. Storil*, 2 Ves. & Bea. 222.

¹ Jarman, p. 463, ch. XIV.

² *Dickson v. Robinson*, Jac. 503; *Roberts v. Smith*, 1 Sim. & Stu. 513; *Reynolds v. Torin*, 1 Russ. 129; *Goodfellow v. Goodfellow*, 18 Beav. 356. In the case of *Roberts v. Smith*, 1 Sim. & St. 513, Sir John Leach, V.-C., said: "The principle referred to in *Chalmers v. Storil* decides this case. The plain intention of the testator was that the wife should have half the income of his property for the

maintenance of herself and her children by her former husband, and that the other half of the income should be applied to the maintenance and education of the testator's own children. That intended equality would be disappointed if the wife were in the first place to take her dower."

³ *McLeod v. McDonnell*, 6 Ala. 236, 239 (1844); *Griggs v. Veghte* (N. J., 1895), 19 Atl. R. 867; *Helme v. Strater*, 52 N. J. Eq. 591, 30 Atl. R. 333; *Closs v. Eldert*, 37 N. Y. S. 353, 16 Misc. R. 104; *Bailey v. Byce*, 4 Strob. (S. C.) Eq. 84.

⁴ See cases cited on p. 1041.

⁵ *Lawrence v. Lawrence*, 2 Vern. 365; *Strahan v. Sutton*, 3 Ves. 249; *Brown v. Parry*, 2 Dick. 685; *Inclendon v. Northcote*, 3 Atk. 430, 436.

annuity to other persons, was presumed to be in satisfaction of dower, and that the lands devised were not subject to dower.¹ This rule was repudiated by no less an authority than Lord Hardwicke,² and his determination of the question has been followed as a settled rule of law. There is nothing in the gift of an annuity or the creation of a rent charge for life which in itself indicates any intention that the provision thus made shall be in lieu of dower in the lands which are charged with it. Whether the annuity shall or shall not be a bar to dower depends upon the express language of the will or upon necessary implication.³ If the rents and profits derived from the land which is devised are not sufficient to satisfy *both* the annuity and the dower, it may be presumed that the testator gave the annuity in lieu of dower.⁴ Particularly would this be the case where the surplus income of the lands, after the payment of the annuity, was to be devoted to the support of a child or the children of the testator during minority.⁵

§ 747. **The effect of an election by the widow to take under the will.**—Where the widow or other person put to an election has elected to take under the will, he or she is forever absolutely debarred from every right to or interest in the property which belonged to him but which the testator has given to another. Thus, for example, where the widow of the testator has elected to accept real or personal property given her by the will, and which, either expressly or by necessary implication, is to be taken in lieu of dower, she is forever barred of dower, not only in the lands which her husband owned at the time of his death, but in those which he had conveyed during the coverture by deed of conveyance in which she did not join.⁶

¹ Arnold v. Kempstead, Amb. 466, 2 Ed. 236; Villareal v. Galway, Amb. 682, 1 B. C. C. 292; Wake v. Wake, 3 B. C. C. 255, 1 Ves. Jr. 335.

² See Pitts v. Snowden, 1 B. C. C. 292, n.

³ Kennedy v. Nedrow, 1 Dall. 415, 418, 421; Adsit v. Adsit, 2 Johns. Ch. (N. Y.) 448; Smith v. Kniskern, 4 Johns. Ch. (N. Y.) 9; Lasher v. Lasher, 13 Barb. (N. Y.) 106; Hatch v. Bassett, 52 N. Y. 359; French v. Davies, 2 Ves. Jr. 572; Birmingham v. Kirwan, 2

Sch. & Lef. 444, 453; Pearson v. Pearson, 1 Bro. C. C. 291, 292; Dowson v. Bell, 1 Kee. 761; Holdich v. Holdich, 2 Y. C. C. 18; Lowes v. Lowes, 5 Hare, 501; Hall v. Hill, 1 D. & War. 103; Wood v. Wood, 5 Paige, 601; Fuller v. Yeates, 8 id. 325.

⁴ Foster v. Cooke, 3 B. C. C. 347; Pearson v. Pearson, 1 B. C. C. 291.

⁵ Alling v. Chatfield, 42 Conn. 276.

⁶ Evans v. Pierson, 9 Rich. (S. C.) Eq. 9; In re Machemer's Estate, 140 Pa. St. 544 (1891), 21 Atl. R. 441; Corry

She is barred of her dower irrespective of the fact that her husband has not disposed of the lands under his will, or that he has disposed of them and the attempted disposition has lapsed or failed because of its illegality, so that the land descends to the heir. But a provision of real or personal property accepted by the widow in lieu of dower will not prevent her from asserting her claim to the share of the personal estate she may be entitled to under the statute of distribution. The effect of the acceptance of the provision in satisfaction of dower will not be extended to include any right or interest which she may have in the estate of the testator except the right for which it was given. So far as her claim as statutory next of kin to a share in the personal property is concerned, it is not material whether the testator has made no disposition whatever of it under his will, or whether he has made a disposition which lapsed or was void because of its illegality.¹

v. Lamb, 45 Ohio St. 203, 12 N. E. R. 660; Allen v. Pray, 3 Fairf. (Maine, 1835), 138; Spalding v. Hershfield, 15 Mont. 253, 39 Pac. R. 88; Ragsdale v. Parrish, 74 Ind. (1881), 191, 196; Reshore v. Little, 114 Ind. (1887), 8, 11; Collins v. Collins, 126 Ind. 559, 563; Brokaw v. Brokaw, 41 N. J. Eq. 304, 7 Atl. R. 414; Moore v. Steidell, 1 Disney (Ohio, 1857), 281; Fairchild v. Marshall, 42 Minn. 14, 43 N. W. R. 563; Stokes v. Norwood, 44 S. C. 424, 22 S. E. R. 417; Steele v. Fisher, 1 Edw. (N. Y., 1832), 435; Palmer v. Voorhis, 35 Barb. (N. Y.) 479; Gibbon v. Gibbon, 40 Ga. 562, 574, 576, 579; Sanders v. Wallace (Ala., 1898), 24 S. R. 354; Chapin v. Hill, 1 R. L. 446. Under a statute providing that, if a testator shall devise land to his wife, such devise shall, unless renounced, be presumed to be in lieu of dower out of his real estate whereof he shall die seized, the widow is not barred of dower in lands which he has conveyed during coverture to his daughter for a nominal consideration by deeds in which she has not joined. Hall v. Smith, 103 Mo. 289, 15 S. W. R. 621.

¹ Perkins v. Lord Stamford, 2 Ves. Jr. 272, 581, 3 Ves. 332, 335, 492; Hilliard v. Binford, 10 Ala. (1846), 977, 987; Nelson v. Pomeroy (Conn., 1898), 29 Atl. R. 534; Lefevre v. Lefevre, 59 N. Y. (1875), 434, 447; Kempton's Appeal, 23 Pick. (Mass.) 163; Nickerson v. Bowley, 8 Met. (Mass.) 424. A testator gave his entire estate to his widow, providing that, if she should again marry, she should receive one-third of the estate. Held, that the widow on remarriage was entitled, as a distributee, under the statute, to one-third of the personal intestate estate. Bennett v. Packer, 39 Atl. R. (Conn., 1898), 739. Thus, in England, it has been held that a gift to the widow "in lieu and satisfaction of dower and all *other claims* which she could or might have had or have been entitled to out of the testator's estate" will not bar her right as the heir of a copyhold estate. Norcot v. Gordon, 14 Sim. 238, 258. See also Sutton v. Read (Ill., 1898), 51 N. E. R. 801. Where the testator in his will directs that his wife shall have a house for her residence during her life free, which she accepts, she can-

Where the widow is an heir of her husband she is not barred as an heir by her acceptance of a devise in lieu of dower. For if, as we think, the two capacities are separate and distinct, she may, while taking under the will as widow of the testator, contest its provisions as his heir. Hence she may, as heir, totally overthrow the will, in which case, the will being invalid, there is no necessity for her to elect. Where the statutes make her election to take under the will a bar both of her right of dower and her right to a distributive share of the personal property of the testator, they do not affect her right as the heir of the testator. Thus, though she may have to make her election *as widow* within one year, she may *as heir* have a longer period in which to contest the will, and by securing a revocation of the probate render the election of no effect. The rule that a provision accepted in lieu of dower does not prevent the widow from taking as heir or next of kin of the testator in the case of his intestacy, even when such is apparently his intention, is based upon the principle that, in order to disinherit the heir at law and, for the same reason, the next of kin, the property must be disposed of to some one else. If, therefore, the testator is partially intestate either as to his real or personal property, no reason exists that one of the heirs or next of kin should be deprived of what the will gives him, and compelled to elect between it and a gift under the will, because the testator has seen fit to confer a bounty upon him. The effect of excluding the widow from taking her share in the personal estate undisposed of would be to increase the shares of the next of kin.¹

Where a widow, with a full knowledge of her rights, has

not claim homestead. *Cowdroy v. Hitchcock*, 103 Ill. 262; *Warren v. Warren*, 148 Ill. 641, 652.

¹ Thus it has been held that a gift to a wife for her jointure and "*in lieu of dower and thirds at common law in all the real or personal estate*" would not prevent her from taking her share under the statute of distribution. *Gurly v. Gurly*, 2 Dr. & Wal. 463, 8 Cl. & Fin. 743. The same was held in *Hodgman's Estate*, 140 N. Y. 421, 35 N. E. R. 660; *Suther-*

land v. Sutherland (Iowa, 1897), 71 N. W. R. 424; *Sutton v. Read* (Ill., 1898), 51 N. E. R. 801. Where the gift was "for her jointure and in lieu of dower and thirds at common law," no reference being made to the personal estate, the widow was only precluded from taking her dower. She was not compelled to elect between the gift and what she was entitled to under the statute of distribution as next of kin. *Colleton v. Garth*, 6 Sim. 19.

elected to take an estate for her widowhood in lieu of dower, and she subsequently remarries, she forfeits her estate. Nor can she then claim her dower either in the lands which she forfeits, or in any of the lands owned by the testator, even though he has made no disposition of such lands in his will.¹ Neither can her personal representatives, under such circumstances, make an election after her death.²

In case the widow elects to take under the law and to relinquish the gift which the will gives her, the will, so far as the provision which was made for her is concerned, is void. If, therefore, the testator had directed that lands shall be sold and the proceeds paid to her, or used for her support in lieu of dower, and she elects to take *against the will*, no conversion, either actual or constructive, will take place, but the property *unconverted* will be applied to compensate the legatees or devisees who are disappointed by her election.³

And where the provision in the will for the wife in lieu of dower consists wholly or in part of a life estate, or an estate during widowhood with remainder to others, and the widow elects to take against the will, her action, except so far as the assertion of her dower right in the real estate given in remainder will diminish its value, will have no other effect upon the interests of the remaindermen than to accelerate them.⁴ Thus, where the testator gave his widow an estate in fee in a portion of his property, and an annuity, and also annuities to

¹ *Ellis v. Lewis*, 8 Hare, 818; *Bennett v. Packer* (Conn., 1898), 39 Atl. R. 789; *Church v. Bull*, 2 Denio (N. Y.), 430, 432; *Smith v. Bone*, 7 Bush (Ky., 1870), 367; *In re Souder's Estate*, 15 Pa. Co. Ct. R. 285; *O'Harrow v. Whitney*, 85 Ind. 140, 148; *McGuire v. Brown*, 41 Iowa, 650, 655; *Harmon v. Brown*, 58 Ind. 207; *Stillwell v. Knapper*, 69 Ind. 558; *post*, note 3, p. 1049.

² *Buish v. Dawes*, 8 Rich. (S. C.) Eq. 281; *Hurley v. McIver*, 21 N. E. R. 325, 119 Ind. 58.

³ *Barnett v. Barnett*, 1 Met. (58 Ky., 1858), 254; *Armstrong v. Park*, 9 Humph. (28 Tenn., 1849), 195; *Brink*

v. Layton, 2 Redf. (N. Y.) 79; *Hoover v. Landis*, 76 Pa. St. 354.

⁴ *Brown v. Hunt*, 12 Heisk. (59 Tenn., 1873), 404; *Wood v. Wood*, 1 Met. (Ky.) 512; *Allen v. Hannum*, 15 Kan. (1875), 625; *In re Schultz's Estate* (Mich., 1896), 71 N. W. R. 1079; *Randall v. Randall* (Md., 1897), 87 Atl. R. 209; *Portuondo's Estate*, 165 Pa. St. 472, 474, 39 Atl. R. 1105; *Vance's Estate*, 141 Pa. St. 203; *Ferguson's Estate*, 138 Pa. St. 308. The renunciation by the widow of a rent charge for the provision which the law makes for her in her husband's real property extinguishes the charge. *Armstrong v. Park*, 9 Humph. (Tenn., 1849), 195.

other persons, payable after the death of the widow, and the widow renounced and took her dower, all the legatees, including the residuary legatee, have their gifts accelerated, and an immediate distribution of the estate must be made.¹

It has been the subject of much discussion whether a widow is put to her election by the gift of a life estate in land, with a devise of the fee of the land to others, in the absence of a direction that the life estate is to be accepted by her in lieu of dower. This inquiry may be viewed from a double standpoint. *First.* Assuming that the widow accepts the life interest devised to her, it is well settled that she is not debarred from claiming dower in the remainder of the fee which has been devised to other persons after her death.² *Second.* Assuming that she has, with a full knowledge of her rights, made an election and has accepted a life estate which is determinable on her remarriage in lieu of her dower in the real property of the testator, and the remainder of the real property of the testator is devised to others, can she subsequently, on her forfeiture of her life estate by her remarriage, claim her dower in the specific piece of property in which she had a life estate? There are a few decisions which would permit the widow to claim dower after she has forfeited her life estate by a remarriage.³ But the majority of the decisions sustain the rule that, where a widow, with a full knowledge of her rights under the law, accepts an estate for life or widowhood in lieu of dower, and subsequently forfeits that estate, she cannot then claim dower in the land which she forfeits; nor, if the life estate was given and accepted in lieu of dower, can she then claim dower in the balance of the lands owned by the testator, whether that balance was or was not disposed of by the will.⁴

¹ *Slocum v. Hagaman*, 176 Ill. 533, 52 N. E. R. 332.

² *Havens v. Havens*, 1 Sandf. Ch. (N. Y.) 325; *Sandford v. Jackson*, 10 Paige (N. Y.), 266; *Mills v. Mills*, 28 Barb. (N. Y.) 454; *Lewis v. Smith*, 9 N. Y. 502.

³ *Mitteer v. Wiley*, 34 Iowa, 214; *Sandford v. Jackson*, 10 Paige (N. Y.), 266; *Lewis v. Smith*, 9 N. Y. 502; *Mills v. Mills*, 28 Barb. (N. Y.) 454.

⁴ *Ellis v. Lewis*, 3 Hare, 313; *Bennett v. Packer* (Conn., 1898), 39 Atl.

R. 739; *Smith v. Bone*, 7 Bush (Ky., 1870), 367; *O'Harrow v. Whitney*, 85 Ind. 140, 143; *Harmon v. Brown*, 58 Ind. 207; *Stilwell v. Knapper*, 69 Ind. 558; *McGuire v. Brown*, 41 Iowa, 650, 655; *Stark v. Hunton*, Saxton (N. J. Eq.) 217, 224, 225; *Hamilton v. Buckwalter*, 2 Yeates (Pa.), 389, 392; *In re Souder's Estate*, 15 Pa. Co. Ct. R. 285; *Caston v. Caston*, 2 Rich. (S. C.) Eq. 1; *Cunningham v. Shannon*, 4 Rich. Eq. (S. C.) 13; and see also note 1, page 1048.

§ 748. **Compensation to widow when devise taken in lieu of dower fails.**—A legacy or a devise given to the widow in lieu of her dower, and accepted by her, *provided the testator owns real property at his death*, does not abate with other similar legacies on a deficiency of assets to pay his debts. Her right to dower is regarded as in the nature of a debt of the testator, or, more properly speaking, as a lien or a charge upon the real property of the testator, and the widow's relinquishment of dower is the consideration for the legacy.

The legacy differs materially from ordinary legacies which spring out of the bounty of the testator, and which are voluntary gifts. A legacy in lieu of dower stands in the light of money paid by the estate of the testator to discharge a lien upon his real property, and, as he may be presumed to know how much its discharge is worth, it is not material that the legacy is *greatly in excess of what the dower was really worth to his widow*.¹ Hence, if the property which she takes under the will is subsequently sold, or taken for the payment of debts or of legacies, she has a right to demand that she shall be compensated for what she has lost out of the property of the other beneficiaries.² A widow who elects to accept land which has been devised to her in lieu of dower takes the land subject to any incumbrance which *was upon it at the death of the testator*. If the land devised to her in lieu of dower was subject to a mortgage at the death of the testator, she is not entitled, under modern statutes,³ to have the land exonerated from the mortgage out of the personalty by the executor unless the will ex-

¹ 1 Roper, Leg., p. 433; Howard v. Francis, 30 N. J. Eq. 444, 1 Am. Pro. Rep. 320, 324; Thompson v. Egbert, 17 N. J. L. 459; Williamson v. Williamson, 1 Paige (N. Y.), 298, 305; Pollard v. Pollard, 1 Allen (83 Mass., 1861), 490, 491; Hubbard v. Hubbard, 6 Met. (47 Mass., 1843), 50; Heath v. Dendy, 1 Russ. 543. See also cases cited, p. 537, note 1.

² Dunning v. Dunning, 82 Hun, 462, 31 N. Y. S. 719; Hone v. Van Schaick, 7 Paige (N. Y., 1838), 221, 20 Wend. (N. Y.) 564; Williamson v. Williamson, 1 Paige (N. Y., 1828), 298, 305; Gist v. Cattell, 2 Des. (S. C.) Eq. 53;

Thomas v. Wood, 1 Md. Ch. 296, 300. If a widow accepts a provision which fails for illegality, equity will relieve and permit her to claim her dower. Hone v. Van Schaick, 7 Paige (N. Y.), 221, 223. On the other hand it is held that land taken in lieu of dower is subject to pay its proportion of the debts of the testator. Inge v. Boardman, 2 Ala. 331 (1841); Bray v. Neill, 21 N. J. Eq. (1871), 343; Harrison v. Taylor (Ky., 1899), 51 S. W. R. 193; Stevenson v. Brown, 4 N. J. Eq. 503, 504.

³ *Ante*, p. 531.

pressly so directs. The fact that the land was mortgaged before marriage, and that there is a general direction to pay debts, does not alter the rule.¹ If the widow elects to take under the will she takes subject to all charges under the will.² And she must pay all taxes and charges upon the property devised to her in lieu of dower.³

§ 749. **Statutory provisions regulating the widow's election.**—In some of the states it is now provided by statute that every testamentary provision made by the testator for his widow shall be presumed to be intended to be given in lieu of her dower, unless it shall appear from the will expressly, or by necessary implication, that she is to take both the testamentary gift and what she may be entitled to as dower under the law. In those states where the statute provides that a *devise of land* by the testator to his widow shall be presumed to be given in lieu of dower where the will is silent in this respect, the presumption does not apply to a gift of personal property, and if the provision in the will for the widow consists of personalty alone the ordinary presumption applies, and unless *the bequest is expressly or by necessary implication in lieu of dower* the widow may take the personal property bequeathed and may also claim dower in the land of the testator.⁴ But in most of the states in which this statutory presumption in favor of an election is recognized, the rule is applicable not only to devises of land to the widow of the testator, but to gifts of personal property to her as well. Where the will is silent the presumption arises under the statute that the testator meant, by the testamentary provision, that his widow should elect between her dower and what she is to take by the operation of his will, whether the latter consists of real or personal property.⁵

¹ *Meyer v. Cahen*, 111 N. Y. 270, 273 (1888), 18 N. E. R. 852. This subject is fully discussed *ante*, § 386.

² *Kline's Appeal*, 117 Pa. St. (1887), 139.

³ *Warren v. Warren*, 148 Ill. (1893), 641, 653; *Peyton v. Jeffries*, 50 Ill. (1889), 143; *Whyte v. Mayor*, 2 Swan (32 Tenn., 1852), 364; *Houlenbeck v. Cronkright*, 23 N. J. Eq. 407.

⁴ *Pumphrey v. Pumphrey*, 52 Ark. 193, 12 S. W. R. 390; *Tooke v. Harde-*

man, 7 Ga. 20; *Raines v. Corbin*, 24 Ga. 185; *Worthen v. Pearson*, 33 Ga. 385; *Clayton v. Aikin*, 38 Ga. 320; *Martine v. Norris*, 91 Mo. 465, 8 S. W. R. 849; *Pemberton v. Pemberton*, 29 Mo. 408; *Morgan v. Morgan*, 41 N. J. Eq. 235; *Van Arsdale v. Van Arsdale*, 17 N. J. L. 404.

⁵ *Hilliard v. Binford*, 10 Ala. 977, 990; *McGrath v. McGrath*, 38 Ind. 246; *Brown v. Pitney*, 39 Ill. 468; *Mowbry v. Mowbry*, 64 Ill. 383; *Gauch*

In very many of the states it is now provided by statute that unless the widow of the testator shall within one year after his death renounce the provisions made for her in the will, whether or not such gift is expressly stated to be in lieu of dower, by some act or writing clearly manifesting an intention to make an election, she will be conclusively presumed to have taken under the will.¹ The character of the acts, or of the writing, where a writing is required to manifest an intention to elect, depends wholly upon the provisions of the statutes, which should be consulted. The statutes are to receive a reasonable construction with the view of protecting the rights of the widow. In case the statute fixes no time within which an election is to be made, the widow must have a reasonable time to decide, depending upon the circumstances of the case.² The existence of a controversy involving the validity of the will, or the construction of a provision referring to her dower, is a good reason for extending the time within which she is

v. St. Louis Ins. Co., 88 Ill. 255; *Cowdrey v. Hitchcock*, 113 Ill. 262; *Stunz v. Stunz*, 113 Ill. (1885), 210, 23 N. E. R. 407; *Warren v. Warren*, 30 N. E. R. 647, 148 Ill. 650; *Allen v. Hannum*, 15 Kan. 625; *Dow v. Dow*, 36 Me. 211; *Hastings v. Clifford*, 32 Me. 132; *Pratt v. Felton*, 4 Cush. (Mass.) 174; *Reed v. Dickerman*, 12 Pick. (Mass.) 146; *Atherton v. Corlis*, 101 Mass. 40, 44; *Delay v. Vinal*, 1 Met. (Mass.) 57; *Gough v. Manning*, 26 Md. 347, 366; *Hinckley v. House of Refuge*, 40 Md. 461; *Jackson's Appeal*, 126 Pa. St. 105, 17 Atl. R. 335; *Craven v. Craven*, 2 Dev. Eq. (S. C.) 338; *Hair v. Goldsmith*, 22 S. C. 566; *Luigart v. Ripley*, 19 Ohio St. 24; *Davis v. Davis*, 11 Ohio St. 386; *Bowen v. Bowen*, 31 Ohio St. 164; *Anderson's Appeal*, 36 Pa. St. 476; *Reed v. Reed*, 9 Watts (Pa.), 263; *Cauffman v. Cauffman*, 17 S. & R. (Pa.) 16; *Malone v. Majors*, 8 Humph. (Tenn.) 577, 579; *Demoss v. Demoss*, 7 Coldw. (Tenn.) 256, 258.

¹ *Sanders v. Wallace* (Ala., 1898), 24 S. R. 354; *Crow v. Powers*, 19 Ark. (1858), 424; *Pumphrey v. Pumphrey*,

52 Ark. 193, 12 S. W. R. 390; *Lord v. Lord*, 23 Conn. (1854), 327; *Cowdrey v. Hitchcock*, 113 Ill. 262; *Stunz v. Stunz*, 113 Ill. (1885), 210; *Warren v. Warren*, 36 N. E. R. 647, 148 Ill. 650; *Archibald v. Long*, 144 Ind. 451, 43 N. E. R. 439; *Fosher v. Williams*, 120 Ind. 172, 174; *Carper v. Crowl*, 149 Ill. (1894), 465, 474, 36 N. E. R. 1040; *Pratt v. Felton*, 4 Cush. (Mass.), 174; *Hastings v. Clifford*, 32 Me. (1850), 132; *Dougherty v. Barnes*, 64 Mo. (1876), 159; *Grant v. Henley*, 64 Mo. 162; *Bradhurst v. Field*, 57 Hun, 587, 10 N. Y. S. 482; *Sullivan v. McCann*, 2 N. Y. S. 193; *Collins v. Carmen*, 5 Md. (1854), 503; *Gough v. Manning*, 26 Md. (1866), 347; *Chadwick v. Tatem*, 9 Mont. 354, 23 Pac. R. 729; *Appeal of Jackson*, 126 Pa. St. 105, 17 Atl. R. 535; *Sherman v. Baker* (R. I., 1898), 40 Atl. R. 765; *Blunt v. Gee*, 5 Call (Va.), 481; *Noel v. Garrett*, 4 Call (Va.), 92; *Albright v. Albright*, 70 Wis. 528, 532.

² *Reed v. Dickermann*, 12 Pick. (Mass.) 149; *Delay v. Vinal*, 1 Met. (Mass.) 157.

to make up her mind.¹ In some cases it has been held that if a statute requires that a widow's election shall be in writing, her acts and oral statements not of record will not suffice.² Elsewhere it appears that although the statute provides for a formal election by the widow whether she will take under the will of her deceased husband, in lieu of the share which the law gives her, an election may be made by acts *in pais*; and hence the record is not the only proof of such election. The proof of an implied election by a widow whether she will take under her husband's will must be clear and satisfactory; but a deliberate and intelligent choice is deemed to be as binding as though it were formally made.³ But the filing of an instrument, when it is not required by a statute, is not binding upon her.⁴ So far as the formal character of the instrument to be filed is concerned, the statute should be strictly followed.⁵ Ordinarily the writing should be acknowledged by the widow.⁶ Her consent to take under the will when filed becomes a part of the judicial records, and cannot be recalled unless under an order of the court.⁷

A statute which provides that a devise of land by the testator to his wife shall be presumed to be in lieu of dower does not apply to an unconditional gift of personal property.⁸ But a statute which provides expressly that a gift contained in a will shall be presumed to be in lieu of the "widow's share," and that she will also be presumed to have taken under the will unless she files her dissent to its provisions in writing, is applicable to her distributive share.⁹ The filing of a written renunciation is of course unnecessary where the testator has

¹ Church v. Ackermann, 1 N. J. Eq. (1881), 40; Pindell v. Pindell, 40 Md. 537.

² Whited v. Pearson, 90 Iowa, 488, 58 N. W. R. 80; Archibald v. Long, 144 Ind. 451, 454.

³ Reville v. Dubach, 57 Pac. R. 522 (Kan., 1899).

⁴ Richards v. Richards, 90 Iowa, 606, 58 N. W. R. 926.

⁵ Draper v. Morris, 137 Ind. 169, 36 N. E. R. 714; Gullett v. Farley, 164 Ill. 566, 45 N. E. R. 972; Craig v. Conover, 80 Iowa, 355, 45 N. W. R. 892.

⁶ Fosher v. Williams, 120 Ind. 172, 175.

⁷ Coles v. Terrell, 162 Ill. 167, 44 N. E. R. 391; Baldozier v. Haynes, 57 Iowa, 683, 685. The presumption is that the notice of an election to take under the will, found on file, has been legally and properly filed. Beem v. Kimberly, 72 Wis. 343, 39 N. W. R. 542.

⁸ Martine v. Norris, 91 Mo. 465, 3 S. W. R. 849.

⁹ McGhee v. Stephens, 83 Ala. 466, 3 S. R. 808; Ward v. Worfl, 56 Iowa, 467.

given his whole estate to his widow by will.¹ The widow will be presumed to be acquainted with the statutes requiring her election, and it is not the duty of the executor to notify the widow of the provisions of the will in her favor,² unless the instrument gives a longer period to elect than is allowed by the statute.³ In case of the death of the widow *before* filing an election as required by the statute, her right to elect will not devolve upon her heir or personal representative. She will be deemed to have elected to take under the will, though, as matter of fact, she had shown an intention to take under the law by entering into possession.⁴

§ 750. Election in relation to devises of community property.—In the states of Arizona, California, Louisiana, New Mexico, Texas and Washington the law of community property, applied to property owned by the husband and wife, prevails. In those states there is no estate in dower, nor does the husband's estate by the curtesy exist. All property, real and personal, owned by husband or wife is divided into separate property and community property.

Separate property is that property which either party to the marriage relation owned individually before the marriage, or which either party acquires during the existence of the marriage, whether by gift, bequest, devise or descent. All such property with its rents, profits and income, belonging either to the wife or the husband, is separate property. All other property which is acquired by the husband or the wife during the existence of the marriage in any manner which differs from the above is community property. The presumption is that all property is community property, though this presumption may be overcome by clear proof.⁵

During the life of the parties to the marriage the husband possesses the legal right to exercise a complete control and su-

¹ *Bulfer v. Willigrod*, 71 Iowa, 620, 83 N. W. R. 136.

² *Price v. Woodford*, 43 Mo. 247; *Palmer v. Voorhis*, 35 Barb. (N. Y.) 479.

³ *Gale v. Gale*, 48 Ill. 471.

⁴ *McGrath v. McGrath*, 38 Ala. 246; *Fosher v. Williams*, 120 Ind. 172, 174. See also § 743.

⁵ *Smith v. Smith*, 12 Cal. (1859), 216,

225. Property acquired by a man during his cohabitation with a woman whom he afterwards marries is separate property. *McLaughlin's Estate*, 30 Pac. R. 651, 4 Wash. 570; *Kelly v. Kitsap Co.* (Wash., 1898), 32 Pac. R. 554; *Hatch v. Ferguson*, 57 Fed. R. 966, 971. As regards the power to devise community property, see *ante*, § 58.

pervision over the whole of the community property. On the death of either party one-half of the community property goes to the survivor absolutely as separate property, and the other half to the heirs or next of kin of the deceased. The husband, though he may control *all* the community property *while he lives*, cannot dispose of more than *one-half of it by his will*; the rights of the survivor in the community cannot be destroyed; and the will, though purporting to dispose of all the property of the testator, will not be permitted to operate so as to deprive his wife of her share in the common property.¹ The usual presumption, that the testator by general words intends to devise only his own property, will be recognized where he is the owner of community property, and every disposition of his estate in general terms will be construed to include only his half of the common property, over which alone by the law he has the absolute power of disposal by will. Where there is no evidence of an intention on the part of the testator sufficiently strong to overcome this presumption, the wife is not put to her election. She may take what the law gives her in the community property — that is, one-half of it, and also what her husband gives her in the will.² A will disposing of “all the estate I now own and possess” does not show an intent on the part of the testator to dispose of his wife’s interest in the community property.³ So also a provision of a will of a husband that after the widow’s death the executor should, if necessary, rent out the farm to raise money to pay specific legacies, does not show an intention to devise the farm as an entirety, so as to put the widow to an election whether she will accept a life estate

¹Beard v. Knox, 5 Cal. 252, 256 (1855); King v. Lagrange, 50 Cal. 328; Buchanan’s Estate, 8 Cal. 507, 509, 510; Smith v. Smith, 12 Cal. 216, 225; Burton v. Lies, 21 Cal. 87; Scott v. Ward, 13 Cal. (1859), 459, 469, 470; Broad v. Murray, 44 Cal. 229; Payne v. Payne, 8 Cal. 292, 301; Walker v. Howard, 34 Tex. 478, 500; Conn v. Davis, 33 Tex. 203, 209; Mayo v. Tudor, 74 Tex. 471, 473, 74 Cal. 98, 102.

²Noe v. Spivalo, 54 Cal. (1880), 207; Silvey’s Estate, 44 Cal. (1872), 210; Stewart’s Estate, 74 Cal. 98; Payne v. Payne, 18 Cal. (1861), 292, 301; Frey’s

Estate, 52 Cal. 658; Gilmore’s Estate, 81 Cal. 240, 242, 22 Pac. R. 655; Smith v. Butler, 85 Tex. (1892), 126, 130; Crosson v. Dwyer, 9 Tex. Civ. App. 482, 489; Rogers v. Trevathan, 67 Tex. (1887), 406, 409; Carroll v. Carroll, 20 Tex. 731, 746; Morrison v. Bowman, 29 Cal. 337, 348; Beard v. Knox, 5 Cal. 252, 257; Chase v. Briggs, 31 S. W. R. 76, 77 (Tex., 1898); Carroll v. Carroll, 20 Tex. 743; Moses v. Helsley, 60 Tex. 435. Cf. Eyre’s Estate, 7 Wash. 291, 34 Pac. R. 831.

³Haley v. Gatewood, 74 Tex. 281 (1889), 12 S. W. R. 25.

in the entire tract, as devised to her, or renounce the will and retain her community interest.¹ But where the husband devises the wife's share of the community property to a third person, and in the same will gives her a benefit, which, either by the express terms of the will or by necessary implication, is to be taken in lieu of her share of and interest in the community property, the wife is put to her election. The intention to require an election must be clearly expressed.²

Any act upon the part of the widow clearly manifesting her satisfaction with the provisions which have been made for her in the will, in lieu of her interest in the common property, will constitute an election to take under the will.³ A will which, in disposing of community property, states that it is made with full knowledge of the property rights of the husband and wife, and with the knowledge and consent of the wife, shows the testator knows of the law governing the interests of man and wife in community property, and that he meant to dispose of the wife's interest in a way which would not be valid without her consent. The conveyance by the widow of property given her by this will is an election to take under the will.⁴ A will which, after stating that all his property is community property, bequeaths such property in the following terms, "An undivided one-half interest in said property, leaving the remaining undivided one-half of said community property to my wife," though requesting her to dispose of her property to the children, leaves her property undisposed of by the will.⁵

§ 751. Election in the case of a devise of the homestead. The statutes securing a homestead exemption to the head of a family create an interest in land which inures to the heirs, or to the widow and children of the person who has enjoyed the exemption, upon his death. The person claiming a homestead

¹ *Gibony v. Hutcheson*, 50 S. W. R. 648 (Tex., 1899).

² *Smith's Estate*, 38 Pac. R. 950, 951; *Cook v. Trust Co.* (Ky., 1898), 47 S. W. R. 325. Thus, where the testator devises one-half of all his estate to his wife, and directs the balance to be divided up, it will be presumed that he intended to deal with his wife's interest in the community property,

and she will be put to her election. *Estate of Stewart*, 74 Cal. 98.

³ *Estate of Stewart*, 74 Cal. 98, 15 Pac. R. 445; *Rogers v. Trevathan*, 67 Tex. 406, 409, 8 S. W. R. 569; *Smith v. Butler*, 85 Tex. 126, 131, 19 S. W. R. 1083; *Lee v. McFarland* (Tex., 1898), 46 S. W. R. 281.

⁴ *Smith's Estate*, 38 Pac. R. 950, 951.

⁵ *In re Williamson's Estate*, 75 Cal. 317, 318, 17 Pac. R. 221.

has, as a rule, no power to devise it away from the person or persons on whom the law casts it at his decease. The homestead which is exempted by the statute will not pass under a general or residuary devise of the estate of the testator, but will, on his death, go to those persons mentioned in the statute.¹ Where the testator devises property, either real or personal, to those who, under the statute, are entitled to succeed to the homestead, and by the same will devises the homestead to a third person, a case for an election between the inconsistent benefits arises. The intention to devise the homestead will not be presumed. The intention to make such an election incumbent upon such persons must, as in all cases, be clearly manifested.²

Thus, where the testator devises his estate, consisting of his homestead and land and certain personal property, to his widow for life, with a power of disposal if it is required for her support, and a remainder to a stranger;³ or where the testator gives his widow personal property and the use of his home place and household goods for life, on condition that she should not rent it, the same to be in lieu of dower;⁴ or where he devises "a suitable house for her residence during her life," and she elects to take the house in which she and the testator had lived,⁵ an election must be made by her between the property which was given by the will and her homestead privilege. If the widow shall renounce the provisions of the will and shall elect to take the homestead, so that the devise of the homestead to another person shall fail, the devisee of the homestead has his remedy against the estate.⁶

¹ *Scull v. Beatty*, 27 Fla. 426 (1891), 9 S. R. 4; *Bell v. Bell*, 84 Ala. 64 (1887), 4 S. R. 189; *Pratt v. Pratt*, 161 Mass. 276, 37 N. E. R. 435. And see also *Beck v. Seward* (Cal.), 18 Pac. R. 650; and *ante*, § 59.

² *Schorr v. Etling*, 124 Mo. 42 (1894), 27 S. W. R. 395; *Haby v. Fuos*, 25 S. W. R. 1121; *Helm v. Leggett* (Mo., 1899), 48 S. W. R. 675.

³ *In re Well's Estate*, 63 Vt. 116, 21 Atl. R. 270.

⁴ *In re Blackmer's Estate*, 66 Vt. 46, 28 Atl. R. 419.

⁵ *Warren v. Warren*, 36 N. E. R. 611, 148 Ill. 641.

⁶ *Gainer v. Gates* (Iowa), 34 N. W. R. 798. Where land belonging to the wife and occupied as a homestead is devised by her to the husband, subject to an annuity, and the husband occupies the land for six years, he will be deemed to have taken under the will and cannot refuse to pay the annuity. *Fry v. Madison*, 42 N. E. R. 774, 159 Ill. 244.

The statutory rule which obtains in some states, forbidding the alienation of a homestead, occupied as such by husband and wife, by either without the consent of the other, has been regarded, in one case at least, as not applicable to a *devise of the interest of either the husband or the wife*. It is said that an execution of a will is not an alienation, as it does not pass any interest or title in the homestead. The will is revocable until the death of its maker, and is effectuated by that event and by the operation of the statute of wills. *At the death of the testator* the land ceases to be occupied as a homestead, and no reason exists, either in law or public policy, that prevents him from disposing of *his* interest by will when he can no longer enjoy it, though, of course, he has no power to dispose of the interest of the other. His devisee takes it subject to the statutory rights of the surviving spouse or of the children.¹

§ 752. Election in the case of a bequest of the proceeds of an insurance policy.—Where the testator has his life insured for the benefit of A. *without power of revocation* in the testator, or of designating a new beneficiary by his will, and he devises property of his own to A., and in the same will devises the proceeds of the policy, which is payable to A., to another, A. is bound to elect—he cannot claim the devise and the proceeds of the policy. Thus, where a testator gave his real estate to his children and devised to another the proceeds of a policy payable to them, the children, on accepting the devise, elected to relinquish the proceeds of the policy.² And in such cases, where the proceeds of the insurance policy greatly exceed in value the legacy to the beneficiary named in it, he is not only under an obligation to elect, but he has the right to do so for his own protection.

The principle that an occasion for an election arises only in a case where the testator *gives away the interest of another* is applicable to a bequest of the proceeds of an insurance policy.

¹ Vining v. Wallace, 40 Kan. 609, Kan. 590; Martindale v. Smith, 31 Kan. 270, 273; Myers v. Myers, 89 Ky. 442, 12 S. W. R. 933.

² Hartwig v. Schiefer (Ind.), 46 N. E. R. 75; 42 N. E. R. 471, affirmed; Van Schaack v. Leonard, 164 Ill. 602, 607, 45 N. E. R. 982; Huhlien v. Huhlien, 87 Ky. 247, 253, 8 S. W. R. 260.

It is only when we assume that the specific beneficiary named has, during the life or at the death of the testator, a vested right to the insurance money in the nature of property of which he cannot be divested, that he has the right to elect between it and what the will gives him.¹ But when, according to the general rule, the interest of the beneficiary in an insurance policy is regarded, not as a vested right or estate in property, but rather as a mere expectation or possibility on his part of receiving something on the death of the insured, assimilating to the expectation of a legatee under a will, no case for an election arises when the person who is insured disposes of the proceeds of the policy by a will in which he gives the beneficiary a legacy; for the main requisite to an election, that the testator shall by will dispose of the property of another, is absent. The beneficiary named in the policy takes the legacy given him, and the bequest of the insurance money operates under the will, and both legatees take under the will according to the express intention of the testator.

The intention on the part of the testator to put the beneficiary under the insurance policy to an election must be manifested expressly or by necessary implication on the face of the will, as in other cases where an election between inconsistent benefits is required. Accordingly in a case where the testator having his life insured for the benefit of his widow bequeathed her a large sum of money, "*including the proceeds of all insurance upon his life payable to her or otherwise,*" expressly in lieu of dower, and directed that she be paid a certain income during her life by the trustees, and gave the surplus income and all the residue of his estate to others, the court held that the widow, by taking under the will the provision for her *in lieu of dower*, was not under the necessity of relinquishing the proceeds of an insurance policy payable to her as a beneficiary.²

§ 753. The husband's right to elect as respects his curtesy.—At the common law an estate by the curtesy was an interest to which the husband was entitled, upon the death of his wife, in lands or tenements of which she was seized in pos-

¹ For examples of such cases see *ante*, p. 72, note 2.

² In *re Hayden's Estate*, 5 N. Y. Supp. 845, 847, 7 N. Y. S. 313, 54 Hun,

197. The rules governing the disposition by will of the proceeds of insurance policies are explained in full in § 58, *ante*.

session, in fee simple or in fee tail during their coverture, providing always that she had lawful issue born living which might by possibility inherit that estate as heir to the wife. He took, on her death, an estate for life by the curtesy.¹ This right or estate of curtesy is recognized by statute in very many states. In California, Texas, Oregon and Washington it is not recognized. Real property is there held by husband and wife as community property.² In Ohio, Oregon and Pennsylvania the birth of issue is not necessary. In a few of the states the estate by curtesy has been abolished, and under the statute the husband takes a certain definite share of his wife's property, real or personal.

The question arises as to the wife's power to dispose of her real property, held in fee, in such a manner as to deprive her husband of his estate by the curtesy. In some states it is held that a married woman may cut off the husband's curtesy without his consent,³ but the general rule is that the curtesy of the husband cannot be cut off unless he shall assent to the will. A statute enabling a married woman to execute a will to the same extent as a single woman does not alone enable a married woman to destroy the estate by the curtesy of the husband.⁴

Many of these statutes conferring the testamentary power on married women provide that they shall not be construed to deprive the husband of his estate by the curtesy to which he would otherwise be entitled.⁵ Where the estate and interest of the husband are thus protected by the statute, and the wife, while *attempting to dispose of his estate* by will, gives him property over which she has an absolute power of disposal, the husband will be put to his election. Indeed it has been held that a statute referring to an election by a widow is also applicable to an election by the husband⁶ in the matter of his

¹ 2 Bl. Com. 126, 127; *Westcott v. Miller* (1877), 42 Wis. 465; 4 Kent, 27; *Billings v. Baker*, 28 Barb. (N. Y., 1859), 344.

² *Ante*, § 750.

³ *Garner v. Wills*, 92 Ky. 386, 389 (1891), 17 S. W. R. 1023; *In re Mitchell*, 61 Hun, 372; *Sleight v. Read*, 18 Barb. (N. Y., 1854), 159; *Neeley v. Lancaster*, 47 Ark. 175, 179; *Oatman*

v. Goodrich, 15 Wis. (1862), 389; *Mason v. Johnson*, 47 Md. (1877), 347.

⁴ *Teacles' Estate*, 132 Pa. St. 535; *Clarke's Appeal*, 79 Pa. St. 376.

⁵ *Middleton v. Steward*, 20 Atl. R. 846, 47 N. J. Eq. 293; *George v. Bussing*, 15 B. Mon. (Ky.), 558, 563, 564.

⁶ *Shields v. Keys*, 24 Iowa (1868), 298; *Everett v. Croskrey*, 92 Iowa, 333, 335 (1896), 60 N. W. R. 733.

curtesy. The principle of an election is not only applicable to a devise which is in lieu of curtesy,¹ but also in states where curtesy is abolished. An election may be required where the husband has a statutory provision made for him, either in the real property² or in the personal property of the wife.³ The mere fact that the husband acts as his wife's executor and receives a reasonable compensation does not indicate that he has elected to stand by the will, where it gives him nothing, but purports to dispose of his property.⁴

§ 754. **Curtesy in land in separate use trust.**—It has been settled from the earliest times that the real property of a married woman of which she was seized in fee, even though it may have been settled in trust to her separate use, was subject to the estate by curtesy in her husband.⁵ But an estate may be created in trust which shall be wholly free from the curtesy of the husband. The question always is, not *whether the grantor* in a separate use trust *had the power*, but whether he *intended* in creating the separate use *to destroy the husband's curtesy*. The evidence of such an intention must be clear; for, as has been said, a gift of a fee-simple estate, or of money to the separate use of a married woman, gives her the same estate precisely as though she were single. She has the same power to dispose of it by will, but if she does not dispose of it by will her husband's curtesy will attach. The mere fact that the estate is simply limited to her separate use, or even that it is secured to her free from her husband's debts, or that it is expressly stipulated that it should go to her heirs, or that she is given an unlimited power of testamentary disposition over it, does not prevent his curtesy attaching, if she does not dispose of it by the will.⁶

¹ *Cunningham v. Cunningham*, 30 W. Va. 599 (1888), 5 S. E. R. 130; *Allen v. Boomer*, 82 Wis. (1892), 364, 371; *Silsby v. Bullock*, 10 Allen (92 Mass. 1865), 94; *Beirne's Ex'rs v. Von Ahlefeldt* (*Beirne's Ex'rs v. Beirne's Adm'rs*), 11 S. E. R. 46, 33 W. Va. 663.

² *Everett v. Croskrey*, 92 Iowa, 333 (1895), 60 N. W. R. 732; *Wright v. Jones*, 105 Ind. (1885), 17, 21; *Clark v. Clark*, 132 Ind. 25, 26; *Rowley v. Sands*, 141 Ind. 179, 183, 40 N. E. R. 674; *Clark v. Clark*, 132 Ind. (1892), 25.

³ *Appeal of Coe*, 30 Atl. R. 140 (1894), 64 Conn. 352.

⁴ *Tyler v. Wheeler*, 35 N. E. R. 666 (1893), 160 Mass. 206. The lien of the judgment creditors of the husband on his estate by the curtesy is not defeated nor postponed by its merger into the fee of land which is devised to the husband by his wife. *Browne's Adm'x v. Buckover* (Va.), 4 S. E. R. 745.

⁵ *Roberts v. Dixwell*, 1 Atk. 607.

⁶ *Noland v. Chambers*, 2 S. W. R. 121, 84 Ky. 516; *Pool v. Blakie*, 53 Ill.

(1870), 495, 503; *Stokes v. McKibbin*, 13 Pa. St. (1849), 267; *Alexander v. Warrance* (1852), 17 Mo. 228, 231; *Baker v. Nall*, 59 Mo. (1875), 265; *Tremmel v. Kleiboldt*, 75 Mo. (1882), 255, 259; *Cushing v. Blake*, 30 N. J. Eq. 689, 697; *Carter v. Dale*, 3 Lea (Tenn.), 710, 712; *Frazer v. Hightown*, 12 Heisk. (Tenn.) 94; *Chapman v. Price*, 83 Va. 392, 395; *Hutchings v. Bank*, 91 Va. 68; *Kiracofe v. Kiracofe*, 93 Va. 591, 598; *Watts v. Ball*, 1 P. W. 108; *Parker v. Carter*, 4 Hare, 400; *Pitt v. Jackson*, 2 Bro. C. C. 51; *Harris v. Mott*, 14 Beav. 169; *Morgan v. Morgan*, 5 Mad. 408; *Follet v. Tyrer*, 14 Sim. 125; *Appleton v. Rowley*, L. R. 8 Eq. 137, 139; *Massey v. Parker*, 3 My. & K. 174, 181. In a most recent and leading case, *Cooper v. McDonald*, L. R. 7 Ch. D. 288, 300, it was held that though the husband was entitled to curtesy in a separate estate, yet the wife might dispose of it by will, and her husband's curtesy would be defeated.

CHAPTER XXXVIII.

DONATIONS MORTIS CAUSA.

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| <p>§ 755. Donation <i>mortis causa</i> defined, and the origin of the doctrine investigated.</p> <p>756. The necessity for the existence of an immediate apprehension of death.</p> <p>757. The necessity for delivery, actual or constructive—The revocable character of the donation.</p> | <p>§ 758. The character and mode of the delivery.</p> <p>759. Gifts <i>causa mortis</i> of savings bank books, checks and negotiable instruments.</p> <p>760. Gifts <i>causa mortis</i> in trust.</p> <p>761. The character and burden of proof to establish a gift <i>causa mortis</i>.</p> |
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§ 755. Donation *mortis causa* defined, and the origin of the doctrine investigated.—The donation *mortis causa* had its origin in the Roman civil law, whence it was introduced into the English ecclesiastical courts, and ultimately into the courts of chancery in the earlier half of the seventeenth century. In the Roman law three species of *donationes mortis causa* were distinguished, though to the modern eye the lines of demarcation between them are hardly distinguishable. The first is a gift by a person who is in no present danger of death, which is made in contemplation of death in general, to take effect when he dies. This sort of *donatio mortis causa* is the modern nuncupative will. The second sort of *donatio mortis causa* is where the *danger of death is imminent* and the property is delivered, but the gift is defeasible in case of ultimate recovery or escape from the danger of death. This is the modern *donatio mortis causa* of English jurisprudence. The third is where the donor is in *some* danger of death, though it is *not imminent*, and he transfers the property, though without delivery, which is only to take place upon his death.¹

The rules and principles regulating this subject are very fully treated in the books of the writers upon the Roman civil law, and that system of law hedged in these gifts with numerous

¹See *Ward v. Turner*, 2 Ves. 431, 442, citing the civilians: Dig., lib. 39, tit. 6, law 38.

formalities which were well calculated to protect the donor from imposition, to safeguard the interest of the *heres*, and to provide restraints upon improvident persons, whose generosity, exceeding their sense of justice, prompted them to dispose of their patrimony in gifts to friends and dependants to the injury of their creditors and the members of their own families.

The rules regulating gifts *mortis causa* were first formulated at length in England by Lord Chancellor Hardwicke, in a case¹ which was decided by him in the year 1752. In that case, as in most cases which come under this head of the law, the main question was, What shall constitute a delivery of the thing which is the subject of the gift? Among the articles alleged to have been given were receipts for South Sea Annuities, and the court held that the title did not pass by a manual delivery of these papers, which were only evidence of the existence of and title to the thing, and not the thing itself, and which it was the custom to disregard and treat as waste paper after an actual purchase and transfer of the annuities. Though in a previous case decided in 1744, the same chancellor had held the delivery of a bond as a good gift *causa mortis* of the debt,² upon the ground that, though the bond is merely a chose in action, yet *some property* is transferred by its delivery, and the person to whom it is delivered may cancel the debt by destroying the bond, which would prevent bringing an action which could not be maintained at common law without profert, in *this* case the chancellor refused to go any further.

Passing from the questions of the necessity of a delivery, and what shall constitute a good delivery, the court inquired as to the status of *donationes mortis causa* in the ecclesiastical courts. Inasmuch as the gift *causa mortis*, if valid at all, must be a good gift taking the property out of the deceased person's estate, the church courts could not have any direct jurisdiction of the matter by reason of their jurisdiction of the estates of deceased persons. But they had collateral jurisdiction, and modern probate courts have the same jurisdiction in two classes of cases. The first class is where an administrator declines to deliver the surplus assets to the next of kin upon the grounds

¹ Ward v. Turner, 2 Ves. 431, 1 Dick. 170. See White & Tudor's Leading Cases, vol. 1, p. 1058.

² Snellgrove v. Bailey, 8 Atk. 314.

that they have been given away by the deceased person *causa mortis*. The second class is where the delivery of property specifically bequeathed or included in a residue to a legatee is refused by an executor upon the grounds that it has been given *causa mortis*. But the chancellor could find only one case in which the powers of the ecclesiastical court had been exercised, and in that case the pretended gift was held valid as a will.¹ But the English courts of equity have from that time down to the present always assumed jurisdiction of the matter. This jurisdiction is exclusive where the gift is to one person to hold as a trustee for another. In other cases it is concurrent with the power of a court of law, for the donee may bring a suit against the executor at common law to recover the personal chattel which was the subject of the gift *causa mortis*.² The action is one in the nature of *assumpsit*.³ It is necessary in the first place to define a gift *causa mortis*, and to distinguish it from a gift *inter vivos*, on the one hand, and on the other from a legacy. A legacy is a gift of personal property which is contained in a testament, which has been executed with proper formalities qualifying it for probate. The legatee takes no interest whatever from the execution of the will. He has only the expectation of receiving something from the estate of the testator upon his death. This expectation may be disappointed by an ademption or a revocation. The legacy vests in him, if at all, only at or after the death of the testator.⁴ A donation *mortis causa* is a gift of personal property made by a person during his last illness, or when he is in imminent peril of death, or in expectation of death, which the donee is to retain as absolutely his own if the donor shall die of that illness or peril, but which is revocable by the donor at any time during his life, and which is revoked by implication by the recovery of the donor.⁵

The doctrine of *donationes mortis causa* has no reference to transfers of real property.⁶ Upon comparing these definitions it will be seen that a legacy resembles a donation *mortis causa*

¹ Ousley v. Carrill, cited Ward v. 288; Basket v. Hascall, 107 U. S. 602; Turner, 1 Dick. 170. See also Thorold v. Thorold, 1 Phil. 1; Attorney-General v. Jones, 3 Price, 368. ⁴ Ante, §§ 405-411.

² Tate v. Hilbert, 2 Ves. Jr. 111, 120.

⁵ 2 Bl. Com., p. 514; 2 Kent's Com., p. 244; 1 Story's Eq., §§ 606, 607.

⁶ Wentworth v. Shibbes (Me., 1895), 36 Atl. R. 108.

³ Gass v. Simpson, 4 Coldw. (Tenn.) 36 Atl. R. 108.

in that both are ambulatory, and that either may be *revoked by the donor before his death*. But the donee, unlike the legatee, derives his *title directly from the donor*. No probate is required, and the donee takes not *from* the personal representative of the deceased donor, but *adverse to* him. Hence the executor of the donor has no interest in, title to, or control over the thing given, unless it is discovered that a deficiency of assets existed when the gift was made. There is no rule of law which prohibits a man from disposing of his entire personal estate by a gift *causa mortis*.¹ But the donee takes subject to the rights of the creditors of the donor, and, if there is a deficiency of assets the property donated becomes a part of the personal estate of the deceased, and may be devoted, so far as is necessary, to paying the debts of the donor.² If the executor has obtained possession of the property which has been donated, a common-law action will lie to recover it,³ and if the personal representative shall claim title to it because of a deficiency of assets to meet the demands of the creditors, the burden of proof to show this fact is upon him, as it will be presumed that the testator had sufficient wherewith to do justice to his creditors or he would not have been so generous with his property.⁴

¹ *Wetmore v. Brooks*, 18 N. Y. Supp. 852; *Thomas' Adm'r v. Lewis*, 89 Va. 1, 15 S. E. R. 889.

² *Borneman v. Sidlinger*, 15 Me. 429, 431; *Gourley v. Linsenbigler*, 51 Pa. St. 345, 349; *Dunn v. German American Bank*, 109 Mo. 90, 101; *Grant v. Tucker*, 18 Ala. 27; *Mitchell v. Pearce*, 7 Cush. (61 Mass., 1851), 350; *Sexton v. Wheaton*, 8 Wheat. (21 U. S.) 229; *Thompson v. Dougherty*, 12 S. & R. (Pa.) 448; *Brown v. Brown*, 18 Conn. (1846), 414; *Hudnal v. Wilder*, 4 McCord (S. C. Law), 294; *Jones v. Brown*, 34 N. H. 439.

³ *Westerlo v. De Witt*, 36 N. Y. 346; *Michenor v. Dale*, 23 Pa. St. 59.

⁴ To constitute a valid *donatio causa mortis* it must be made in contemplation of death, to be effective only if the donor dies, and must be accompanied by delivery. If the gift is absolute, and is to take effect

whether the donor lives or dies, it is a gift *inter vivos*. A gift *causa mortis*, like a legacy, is revocable during life. But on the donor's death the title of the donee is absolute without proving it in a court of probate, and in this respect it differs from a legacy. A mere promise to pay a sum of money cannot be a *donatio causa mortis*. *Holley v. Adams*, 16 Vt. (1844), 206, 210. *Cf. post*, § 759. Though a gift *causa mortis* may be revoked at any time during the life of the donor, it will not be revoked by a will bequeathing the thing which was given to another than the donee, for the will takes effect *only on the death of the donor*, by which also the donation becomes absolute. *Brunson v. Henry*, 140 Ind. 455, 39 N. E. R. 256. But if the donee bequeaths the subject of the gift *causa mortis*, by the same will giving a leg-

§ 756. **The necessity for the existence of the immediate apprehension of death.**—In order to constitute a valid gift *causa mortis* it is absolutely essential that the gift should have been made in the immediate apprehension of death from an existing illness or an impending peril.¹ It is not essential that the donor should expressly state in words that he makes the gift in the immediate expectation of death. Such an intention and expectation may be presumed from the circumstances under which the delivery is made, as where the donor is in fact upon his death bed or in his last sickness.²

A gift made in contemplation, expectation or fear of a possible or even a very probable death in the future, *e. g.*, by a sailor, a soldier or a traveler embarking upon an extremely hazardous voyage, or upon an expedition attended with danger to life, is *not* a good gift *causa mortis* in the modern law.³ If the gift was in fact made in the immediate expectation of death, it is not material that some time had elapsed before death actually occurred, provided the death of the donor resulted from *the same disease or accident* and the gift was not revoked in the meantime.⁴

acy to the donee, the latter must elect between the gift and the legacy, and cannot claim both. *Johnson v. Smith*, 1 Ves. 314.

¹ *Carty v. Connolly*, 91 Cal. 15, 22; *Zeller v. Johnston*, 105 Cal. 143, 148, 38 Pac. R. 640; *First Nat. Bank v. Balcom*, 35 Conn. (1868), 351; *Raymond v. Sellick*, 10 Conn. 480 (1835); *Devol v. Dye*, 123 Ind. 321, 24 N. E. R. 246; *Brunson v. Henry*, 140 Ind. 455, 39 N. E. R. 255; *Smith v. Dorsey*, 38 Ind. (1871), 451; *Knot v. Hogan*, 4 Metc. (Ky.) 99; *Weston v. Hight*, 17 Ma. 287; *Sheedy v. Roach*, 124 Mass. 472, 475; *Ellis v. Secor*, 31 Mich. (1875), 185, 189; *Prickett v. Prickett*, 20 N. J. Eq. 478, 479; *Irish v. Nutting*, 47 Barb. (N. Y.) 370, 373, 387; *Van Fleet v. McCarn*, 2 N. Y. Supp. 675; *Langworthy v. Crisey*, 31 N. Y. Supp. 85, 10 Misc. Rep. 450; *Champney v. Blanchard*, 39 N. Y. (1868), 111; *Desheimer v. Gautier*, 34 How. Pr. Rep. (N. Y.) 472; *Kirk v. McCusker*, 22 N.

Y. Supp. 780, 781; *Gourley v. Linsbigler*, 51 Pa. St. 345; *Rhodes v. Childs*, 64 Pa. St. 18, 24 (1870); *Brickhouse v. Brickhouse*, 11 Ired. (N. C.) L. 404, 406; *Thompson v. Thompson*, 12 Tex. 327; *French v. Raymond*, 39 Vt. 623.

² *Miller v. Miller*, 3 P. Wms. 356; *Walter v. Hodges*, 2 Sw. 100. And see *Reynolds v. Reynolds*, 45 N. Y. Supp. 338.

³ *First Nat. Bank v. Balcom*, 35 Conn. 351; *Price v. Hudson* (Ill., 1895), 17 N. E. R. 817; *McCarty v. Kearnan*, 86 Ill. 291; *Proseus v. Porter*, 46 N. Y. Supp. 656; *Smith v. Dorsey*, 33 Ind. 451. And see cases in last note. Compare *Virgin v. Gother*, 42 Ill. 39.

⁴ *Darland v. Taylor*, 52 Iowa, 503, 506. In *Williams v. Guile*, 117 N. Y. 343, 22 N. E. R. 1071, a period of six weeks elapsed between the delivery of the property and the death of the donor. See also *Ridden v. Thrall*, 7

§ 757. **The necessity for delivery, actual or constructive. The revocable character of the donation.**—If the donor recover from the disease or escape the danger which created the apprehension of death, the gift is revoked by implication of law.¹ Or it may be expressly revoked by the donor at any time prior to his decease.² The main requisite to the validity of a gift *causa mortis* is that there shall be a delivery or tradition of the thing given by the donor to the donee.³

What acts upon the part of the donor are sufficient to constitute a delivery we will now proceed to consider.

§ 758. **Character and mode of the delivery.**—It was insisted by the English chancellors in the early cases that there must be an *actual delivery* of the chattel which was given. A *symbolic delivery* of a key of a box or trunk in which the chattel was kept would not suffice. The strict application of this rule

N. Y. Supp. 822, 55 Hun, 185, 24 Abb. N. C. 52.

¹ Logenfeil v. Richter, 61 N. W. R. 826, 828, 60 Minn. 49; Conser v. Snowden, 54 Md. 175, 185; Carty v. Connolly, 91 Cal. 15; Thomas v. Lewis, 89 Va. 1, 15 S. E. R. 389; Collins v. Collins, 31 N. Y. Supp. 1017, 11 Misc. R. 28; Michener v. Dale, 23 Pa. St. 59; Bunn v. Markham, 7 Taunt. 224; Tate v. Hilbert, 2 Ves. 111. In Gardner v. Parker, 3 Madd. 184, Sir John Leach said: "This bond was given in the extremity of sickness and in contemplation of death; and it is to be inferred that it was the intention of the donor that it should be held as a gift only in case of his death. If a gift is made in expectation of death, there is an implied condition that it is to be held only in the event of death."

² Rhodes v. Childs, 64 Pa. St. 18, 23; Parker v. Marston, 27 Me. 196, 204; Ellis v. Secor, 31 Mich. 185; Gratton v. Appleton, 2 Story C. C. 755; Parish v. Stone, 14 Pick. (Mass.) 198; Doran v. Doran, 99 Cal. 311, 315; Barnum v. Reed, 136 Ill. 388, 398; Walsh's Appeal, 122 Pa. St. 177; Brunson v. Henry, 140 Ind. 455, 39 N. E.

R. 256, 259; Dale v. Lincoln, 31 Me. 422.

³ Bromberg v. Bates (Ala., 1897), 20 S. R. 786; Williams v. Chamberlain, 46 N. E. R. 250 (Ill., 1896); Dunbar v. Duñbar, 80 Me. 450; Fearing v. Jones, 149 Mass. 12, 20 N. E. R. 199; Bowers v. Hurd, 10 Mass. 427; Keepers v. Title Co., 56 N. J. L. 302, 305; Harris v. Cable, 71 N. W. R. 531 (Mich., 1897); Blasdell v. Locke, 52 N. H. (1872), 239; Holmes v. Roper, 141 N. Y. 64, 36 N. E. R. 180; Grymes v. Hone (1872), 49 N. Y. 17; Ridden v. Thrall, 125 N. Y. (1891), 572, 579; Harris v. Clark, 8 N. Y. 93; Kirk v. McCusker, 22 N. Y. Supp. 780, 3 Misc. R. 277; Campbell's Estate, 7 Pa. St. 100 (1847); Michenor v. Dale, 23 Pa. St. 59; Close v. Dennison, 6 R. I. 88; Smith v. Zumbro (W. Va.), 24 S. E. R. 653; Resch v. Senn, 28 Wis. (1871), 286; Miller v. Jeffress, 4 Gratt. (Va.) 479; Trenholm v. Morgan (S. C.), 5 S. E. R. 721; Basket v. Hascall, 107 U. S. 602; Ward v. Turner, 2 Ves. Jr. 431, 1 W. & T. L. Cas. 1059, 1071; Cutting v. Gilman, 41 N. H. 147; Lewis v. Walker, 8 Humph. (Tenn.) 503.

often resulted in overthrowing gifts of choses in action evidenced by bonds and notes which were on deposit for safe keeping in chests or boxes. And the court of chancery distinguished between the delivery of the key of a box which was itself so small that it might have been readily handed over, and the delivery of the key of a wine vault, where the key was not a mere symbol of possession, but the only way of getting at the possession of the wine in the vault. A delivery by symbol was repudiated also by the civil law.¹ But the strictness of the ancient rule has not been adhered to by the modern cases. Equity looks rather to the intention of the parties than to the manner of the delivery. Consequently the delivery may be valid, though symbolic merely, where under the particular circumstances an actual delivery is impossible.²

Admitting that the gift of a set of keys to a box deposited in the vaults of a bank constitutes a delivery of the securities in the box, it is immaterial that the donor had, prior thereto, placed a duplicate set of keys in the hands of a friend to be used in case of the loss of the original set.³ Nor is it necessary that the donee should, on receiving the keys, *at once* proceed to take possession of the chattels. Thus, where the things given were in a portable cupboard in the room occupied by the donor, and he handed the donee the key of the cupboard, saying he wished him to have all that was in it, the donation was held to be valid, though the donee permitted the articles to remain locked up in the cupboard *until after the death of the donor*.⁴

¹ Ward v. Turner, 2 Ves. 431, 1 Dick. 170; and compare *ante*, § 316.

² Dunn v. German Amer. Ins. Co., 109 Mo. 90, 99; Debinson v. Emmons, 158 Mass. 566, 592, 593; Parish v. Stone, 14 Pick. (Mass.) 203; McGrath v. Reynolds, 116 Mass. 566; Marshall v. Berry, 13 Allen (Mass.), 43; Rockwood v. Wiggin, 16 Gray (Mass.), 402; Hatch v. Atkinson, 56 Me. 324. As, for example, where the donor is upon his death-bed and he hands over a key to a trunk or a chest, or safe-deposit vault in which the valuables are kept. Goulding v. Hanbury, 85 Me. (1892), 227, 230, 234, 27 Atl. R. 127; Debinson

v. Emmons, 158 Mass. 592, 593, 33 N. E. R. 706; Cooper v. Burr, 45 Barb. (N. Y.) 9; Marsh v. Fuller, 18 N. H. 360 (1846); Jones v. Brown, 34 N. H. (1857), 429; In re Wise, 37 Atl. R. 936 (Pa., 1897); Wilson v. Mattison, 53 Wis. 23, 27.

³ Thomas' Adm'r v. Lewis, 89 Va. 1, 15 S. E. R. 389. A statute providing that no gift of chattels shall be valid unless actual possession shall have been transferred to the donor has no application to a gift *causa mortis*. Thomas' Adm'r v. Lewis, 89 Va. 1, 15 S. E. R. 389.

⁴ Goulding v. Horbury, 27 Atl. R.

§ 759. **Gifts causa mortis of savings-bank books, checks and negotiable instruments.**— Whether the actual delivery of a bank-book showing a deposit to the credit of the donor in a savings bank, alone and without any further action on the part of the donor or donee, is a valid gift *causa mortis* of the money upon deposit is not settled. The current of the most recent cases seems to sustain the affirmative of this proposition where the delivery of the pass-book is accompanied by language on the part of the donor sufficient to show an intention to pass the title to the money on deposit, and where the donor, in surrendering the possession of the pass-book, also *surrenders all dominion and control over it*.¹ But neither verbal declarations

127, 85 Me. 227, 234. The fact of the delivery is to be determined by the jury. *Dunn v. German American Bank*, 109 Mo. 90, 18 S. W. R. 1139. In the case of *Coleman v. Parker*, 114 Mass. 30, the court said: "We have no doubt that a trunk with its contents might be effectually delivered in such a case by the delivery of the key. If the key in this case had been placed in the hands of the witness, the donor relinquishing all dominion and control over it, and parting with it absolutely, or if by the direction of the donor the witness had taken it into her possession and control, there would have been a sufficient delivery to make out a full title in the plaintiff." A delivery of keys will not be equivalent to a delivery of household furniture, in the absence of proof that the keys given secured access to the furniture. In *re Somerville*, 2 Con. Sur. 86. The destruction by the donor of a note obligatory on the donee may be a good constructive delivery as against the donor's personal representative. *Darland v. Taylor*, 52 Iowa (1879), 503, 506; *Gardner v. Gardner*, 22 Wend. (N. Y.), 525, 526; *Lee v. Boak*, 11 Gratt. (Va., 1854), 182, 186, 188; *Morse v. Weston*, 152 Mass. 5, 6 (1890). Where a donor, in the expectation of death, hands a sum of money to the donee,

intending it to be a gift *causa mortis*, the delivery is sufficient, though the donee immediately placed the money in the desk of the donor. *Carle v. Monkhouse*, 50 N. J. Eq. 537, 25 Atl. R. 157. The handing over of a bill of sale of articles which are capable of actual delivery is not a sufficient delivery. *Knight v. Tripp* (Cal., 1898), 54 Pac. R. 267. A person in contemplation of her death, stating to a friend that she wanted to give him her property, gave him the key to a desk in which he subsequently placed certain notes indorsed by her, he retaining the key. Held, not a sufficient delivery.

¹*Camp's Appeal*, 36 Conn. (1869), 88; *Hill v. Stevenson*, 63 Me. 364; *Drew v. Haggerty*, 81 Me. 231 (1889), 17 Atl. R. 63; *Debinson v. Emmons*, 158 Mass. 592, 593; *Pierce v. Savings Bank*, 129 Mass. (1880), 425; *Sheedy v. Roach*, 124 Mass. 472, 475; *Callanan v. Clement*, 42 N. Y. Supp. 514; *Devlin v. Farmer*, 9 N. Y. Supp. 530; *Reynolds v. Reynolds*, 45 N. Y. Supp. 338; *Loucks v. Johnson*, 24 N. Y. Supp. 267, 268; *Walsh v. Bank*, 7 N. Y. Supp. 669; *Tillinghast v. Wheaton*, 8 R. I. (1867), 536, 542, 543; *Dean v. Dean*, 43 Vt. (1871), 337. But compare, *contra*, *Conser v. Snowden*, 54 Md. (1880), 185; *Case v. Dennison*, 9 R. I. 88, 90; *Daniel v. Smith*, 64 Cal. 346 (1883), 30 Pac.

by the donor, nor his written statement of an intention on his part to make a gift, is enough to constitute a delivery in case of a deposit in a savings bank which is evidenced by a savings-bank book which is not delivered.¹ And the gift *causa mortis* of a bank-book, assuming it to be valid as such, was held to have been revoked where the donor, a short time prior to his death, told the donee to go to the bank, get the money and bring it to him.²

The rule regulating gifts *causa mortis* consisting of choses in action evidenced by written instruments is apparently involved in inextricable confusion. The leading case³ determined that though the handing over by the obligee of a bond which is a specialty might be a valid delivery which would transfer title to the debt, for the reason that by canceling the bond the right to recover the debt was gone, because of the impossibility of making proferat, the transfer of certain receipts for stock did not constitute a delivery thereof, for the stock might be sold and transferred only by an entry on the books of the corporation, after which the receipts were so much waste paper. Later cases have departed widely from this rule. While the *check of the donor, drawn by him upon money which is in a bank and to his credit, may not constitute a valid gift causa mortis*, because it is merely an order or authority to receive money from his bailee, and over which he never loses control until it is paid, for he may recall it at any moment before it is accepted, and it is revoked by his death, nevertheless a person may make a valid gift of choses in action which he holds *against other persons*, as bank notes, checks, drafts and bills of exchange drawn by others and in his possession. Thus, it is well settled, according to the current of the modern cases, that negotiable paper, such as bank notes,⁴ bonds,⁵ deposit notes and certificates

R. 575, 17 Pac. R. 683; Walsh's Appeal (Pa. St.), 15 Atl. R. 470; Thomas' Adm'r v. Lewis (Va., 1897), 15 S. E. R. 389; McConnell v. Murray, 8 L. R. Eq. 460.

¹ McMahon v. Savings Bank, 67 Conn. 78, 84 Atl. R. 709.

² Doran v. Doran, 99 Cal. 811, 33 Pac. R. 929. Compare Crue v. Caldwell, 52 N. J. L. 215, 19 Atl. R. 188.

³ Ward v. Turner, 1 Dick. 170, 2 Ves. 431.

⁴ Hill v. Chapman, 2 Bro. C. C. 662; Shanley v. Harvey, 2 Eden, 125.

⁵ Snellgrove v. Bailey, 3 Atk. 814; Duffield v. Elwes, 1 Bligh (N. S.), 543; Wells v. Tucker, 3 Binn. (Pa.) 366 (1811); Waring v. Edwards, 11 Ind. (1858), 424.

of deposit,¹ mortgages² and insurance policies,³ or checks payable to the order of the donor, or payable to bearer, may be the subject of a valid gift *causa mortis*.⁴ And negotiable instruments payable to the donor or to his order, it has been held, may be the subject of a valid gift *causa mortis*, even though they are not indorsed by the donor.⁵

It is generally held, however, that a note or a check drawn by the donor, or a bill of exchange accepted by him against money which he has on deposit with his banker and *payable after his death*, does not constitute a valid *donatio causa mortis*. A delivery of the subject-matter of the gift during the life-time of the donor is essential to the validity of the gift. In this case the check or note is not the subject of the gift, but a mere order to pay over the money which it represents, operative only before the death of the donor; and, on general principles of agency, his death works a revocation of the banker's authority to pay.⁶ Thus, where a person who had a certificate of de-

¹ *Amis v. Witt*, 33 Beav. 619; *Moore v. Moore*, L. R. 18 Eq. 474; *Hill v. Stevenson*, 63 Me. 364; *Pierce v. Savings Bank*, 129 Mass. 425; *Dean v. Dean*, 43 Vt. (1871), 337; *Camp's Appeal*, 36 Conn. (1869), 88; *Conner v. Root* (Colo., 1895), 17 Pac. R. 773.

² *Durke v. Hicken*, 61 Cal. 346; *Richards v. Symes*, Bar Ch. Cas. 90; *Hurst v. Beach*, 5 Madd. 351; *Duffield v. Elwes*, 1 Bligh (N. S.), 543.

³ *Witt v. Amis*, 1 B. & S. 109; *In re Trough*, 75 Pa. St. 115.

⁴ *Turpin v. Thompson*, 2 Metc. (59 Ky., 1859), 420, 421; *Brooks v. Brooks*, 12 S. C. (1879), 422, 461; *Jones v. Deyer*, 16 Ala. (1849), 221, 225; *Brown v. Brown*, 18 Conn. (1847), 409, 414; *Borneman v. Sidlinger*, 15 Me. 429, 431; *Burke v. Bishop*, 27 La. Ann. 465, 467; *Waring v. Edmons*, 11 Md. (1857), 424; *Harris v. Clark*, 2 Barb. (N. Y.) 56; *Craig v. Craig*, 3 Barb. Ch. (N. Y.) 76, 117; *Gourley v. Linsenbergler*, 51 Pa. St. 345, 349; *Caldwell v. Renfrew*, 33 Vt. 213, 218; *Grover v. Grover*, 24 Pick. (41 Mass.) 261; *Gibson v. Hibbard*, 13 Mich. 214. See also *Blount v. Burrow*, 4 Bro. C. C.

71; *Clavering v. Yorke*, 2 Coll. 363; *Moore v. Moore*, 18 L. R. Eq. 474; *Dunne v. Boyd*, 8 Ir. Eq. 609.

⁵ *Rankin v. Weguelin*, 27 Beav. 308, 309; *Veal v. Veal*, 27 Beav. 303; *In re Mead*, L. R. 15 Ch. D. 651; *Brown v. Brown*, 18 Conn. 409, 414; *Parker v. Marston*, 27 Me. (1847), 196, 204; *Bates v. Kempton*, 7 Gray (73 Mass.), 382, 383; *Crum v. Thornley*, 47 Ill. (1868), 192; *Tillinghast v. Wheaton*, 8 R. I. 536, 540; *Chase v. Redding*, 7 Gray (Mass.), 382; *Stevens v. Stevens*, 2 Hun (N. Y.), 472; *Keniston v. Sceva*, 54 N. H. 24, 38, 39; *Westerlo v. De Witt*, 36 N. Y. 340; and see cases cited in last note.

⁶ *Graves v. Safford*, 41 Ill. App. 659, 662, 26 Atl. R. 803; *Basket v. Hascall*, 107 U. S. 602; *Harris v. Clark*, 3 N. Y. 93, 110; *Holmes v. Raper*, 141 N. Y. 64, 66; *Copp v. Sawyer*, 6 N. H. 386, 389; *Sanborn v. Sanborn*, 65 N. H. 386, 389; *Phelps v. Pond*, 23 N. Y. 69; *Holley v. Adams*, 16 Vt. 206, 210; *Hamor v. Moore*, 8 Ohio St. 239, 242; *Conser v. Snowden*, 54 Md. 175, 185; *Walter v. Ford*, 74 Mo. 195, 198; *McKenzie v. Downing*, 25 Ga. 659, 670;

posit for a sum of money which he had placed at his banker's desired to make a gift *causa mortis* of a part of it, it was held invalid under the following circumstances: A friend filled up a seven days' notice to the bank of an intention to withdraw the amount, which the depositor signed. He then signed a check "pay to self or bearer the sum of £500," which was on the back of the notice, and the paper was handed to the donee; but the donor died before the expiration of the seven days' notice. It was the custom of the bank, where a depositor withdrew a part of his deposit, to give him a new certificate, which, of course, was not done in this case. The court of chancery held that there had not been a valid gift *causa mortis*, inasmuch as the check was not payable until after the death of the donor.¹

If, however, the check has been transferred by the donee to a *bona fide* holder for value, or if, prior to the death of the donor, *it has been certified by the bank* upon which it was drawn, it will operate as a valid gift of the money which it represents,

Flint v. Pattee, 83 N. H. 520; May v. Jones, 87 Iowa, 188, 198; Blanchard v. Williamson, 70 Ill. 647, 652; Parish v. Stone, 14 Pick. 198, 205; Meach v. Meach, 24 Atl. R. 591; West v. Cavins, 74 Ind. 265, 274; Raymond v. Sellick, 10 Conn. 480, 484; Brown v. Moore, 3 Head (Tenn.), 671, 673; Warren v. Durfee, 126 Mass. 338, 341; Helfenstein's Estate, 77 Pa. St. 328; Tate v. Hilbert, 2 Ves. Jun. 111, 4 Bro. C. C. 289. In Byles on Bills, 12th edition, p. 176, it is stated "that a check drawn by the donor upon his own banker cannot be the subject of donation *causa mortis*, because the death of the drawer is a revocation of the banker's authority to pay. But when the owner is dealing with the check of another man, it stands on entirely the same footing as a bill of exchange or promissory note, which may well be the subject of a donation *mortis causa*. For this reason there is no difference between the check of another man and a bill of exchange or promissory note." "In such a case the consideration must be a valuable one for the benefit of

the promisor, or the trouble, loss or prejudice of the promisee. The note is merely a promise to give. It is executory, and the promisor has a *locus penitentie*. It was an engagement to give, not a gift." Fink v. Cox, 18 Johns. (N. Y.) 145, 147. In Curry v. Powers, 70 N. Y. 218, it was said: "The delivery of a check payable at a future date could not be effective to constitute a gift, when the drawing of a check afterwards would revoke it, and when the checks in question were drawn no title vested. Such a case bears no analogy to an order drawn on a particular fund in pursuance of an arrangement with the drawee, which order, on being shown, is admitted to be good, and which operates as an equitable assignment." A certificate of deposit may be the subject of a valid gift *causa mortis*. In re Hall's Estate, 38 N. Y. Supp. 1135, 16 Misc. R. 174; Porter v. Walsh (1895), 1 Ir. 284; Sass v. McCormack (Minn.), 64 N. W. R. 385.

¹ In re Mead, L. R. 15 Ch. Div. 651.

as against the personal representative of the deceased donor.¹ The donor must not only part with the possession of the check or other negotiable instruments, but he must also surrender all his dominion and control over them. If he shall reserve to himself the right to collect the interest or the dividends on them during his life, the mere giving of the paper does not constitute a valid gift *causa mortis* of the stocks, notes or bonds.²

§ 760. **Gifts causa mortis in trust.**—It is well settled that the article given may be delivered either to the donee personally, or to another person to hold for his benefit in trust;³ or to one person as a trustee or agent for several others. The person who is thus constituted a trustee must in turn, either prior to or immediately after the death of the donor, transfer possession to the actual donee or carry out the trust according to the wishes of the donor.⁴

¹ *Vandermark v. Vandermark*, 55 How. Pr. R. (N. Y.) 408; *Sheedy v. Roach*, 124 Mass. 472; *Westerlo v. De Witt*, 36 N. Y. 340, 347; *Harris v. Clark*, 8 N. Y. 93, 111; *Trorlicht v. Weinecker*, 1 Mo. App. 482; *Thresher v. Dyer* (Conn.), 87 Atl. R. 979; *Rolls v. Pearce*, L. R. 5 Ch. Div. 730, W. N. April 28, 1877, p. 98; *Hewitt v. Kaye*, 6 L. R. Eq. 198; *Bromley v. Brunton*, L. R. 6 Eq. 275; *Bouts v. Ellis*, 4 De Gex, M. & G. 249.

² *Hitch v. Davis*, 3 Md. Ch. 266; *Curry v. Powers*, 70 N. Y. 212; *Brown v. Brown*, 18 Conn. 410; *Dunbar v. Dunbar* (Me.), 13 Atl. R. 578. A direction by the donor to his agent to buy bank stock and deliver it to the donee has been held a valid delivery of stock given *mortis causa*. *Hatcher v. Buford*, 60 Ark. 169, 29 S. W. R. 641.

³ *Caldwell v. Renfrew*, 33 Vt. (1860), 213, 218; *McKenzie v. Downing*, 25 Ga. (1858), 669, 670; *Dresser v. Dresser*, 46 Me. 48; *Meach v. Meach*, 24 Vt. 595; *Case v. Dennison*, 9 R. L. 88, 90; *Jones v. Deyer*, 16 Ala. (1849), 221; *Sheedy v. Roach*, 124 Mass. 472, 477; *Devol v. Dye*, 123 Ind. 321, 24 N. E. R. 246; *Tomlinson v. Ellison*, 104 Mo. 105, 113; *Loucks v. Johnson*, 70 Hun (N. Y.),

565, 566; *Clough v. Clough*, 117 Mass. (1875), 83; *Coutant v. Schuyler*, 1 Paige, 316; *Raymond v. Sellick*, 10 Conn. 480; *Ellis v. Secor*, 31 Mich. (1875), 185, 192; *Dole v. Lincoln*, 31 Me. 422; *Michener v. Dale*, 23 Pa. St. 59. *Cf. contra*, *Shackelford v. Brown*, 89 Mo. 546, 1 S. W. R. 390.

⁴ *Kulp v. Marsh* (Pa. St.), 37 Atl. R. 913; *In re Hemphill* (Pa. St.), 36 Atl. R. 406; *Turner v. Estabrook*, 129 Mass. (1880), 425, 432; *Sessions v. Mosely*, 4 Cush. (58 Mass., 1849), 87, 91; *Loucks v. Johnson*, 70 Hun (N. Y.), 45, 47, 24 N. Y. S. 267; *Walter v. Ford*, 74 Mo. (1881), 195; *Baker v. Williams*, 34 Ind. 547, 549; *Larrabee v. Hascall*, 88 Me. 511, 34 Atl. R. 408. In *Hills v. Hills*, 8 Mea. & Wel. 401, where the donor gave directions to the donee that he should pay her funeral expenses and retain for his own use what remained, the court, by Baron Rolfe, said: "I cannot see how the annexation of a trust to the gift can make any difference. If it is lawful to give the money out and out to the party for his own use, I cannot see that it makes any difference that with it he is to pay for a particular thing. If a man on his death bed gives another £1,000,

The trust which has thus been created is subject to the same rules as are all trusts.¹ If the precise nature of the trust is not ascertainable from the expressions of intention by the donor, or if the beneficiaries, or the shares which they are to take, cannot be ascertained, the trust will fall as incapable of execution. The donee in trust does not in such case acquire the property for his own benefit, for the law then regards him as the trustee of *a resulting trust for the benefit of the donor's estate*.²

§ 761. The character and burden of proof to establish a gift *causa mortis*.—No presumption of law exists against the validity of a transaction alleged to constitute a gift *mortis causa*. No reason exists why the law should regard such gifts with suspicion, aside from the opportunity for perjury, which is present in *every judicial proceeding*. It is sometimes said that the making of gifts *causa mortis* is not favored by the law. While the execution of such a gift is much less burdensome, and is easier of accomplishment for a person on his death-bed and *inops consilii*, than the execution of a will, still the peculiar fact that such *ante mortem* dispositions of property may be established wholly by oral evidence offers opportunity for fraud and perjury which the statutory regulations governing the probate and the execution of wills were designed to avoid. The circumstances which are alleged to have attended the making of the gift, the language and the actions of all partici-

is it any addition to the evils attending this mode of bestowing property that he attaches a condition to it, as, for instance, that he stipulates that his brother shall receive an outfit for India?" A person making his will gave the one drawing it a note of his son, to be given to him if he did not contest his will; if he did, to be given to the testator's widow. The testator never again resumed possession of the note, though his wife put it in his pocket-book. *Held*, not a gift *causa mortis*. *Woodburn v. Woodburn*, 23 Ill. App. 289; reversed, 14 N. E. R. 58, 123 Ill. 608; 16 N. E. R. 209, 123 Ill. 608.

¹ *Post*, §§ 785-807.

² *In re Hall*, 16 Misc. R. 174, 38 N. Y. S. 1135; *Sheedy v. Roach*, 124 Mass. 472, 477; *Larrabee v. Hascall*, 88 Me. 511, 34 Atl. R. 408; *Barnum v. Reed*, 136 Ill. 388, 398; *Gano v. Fisk*, 48 Ohio St. 462. Under the statutory law of Louisiana a distinction is made between a mode or charge and a condition, as affecting a donation. The expression of a purpose in making a donation is not equivalent to a condition imposed upon it. Hence a *donatio mortis causa* for charitable or pious uses is not revocable in favor of the heirs because of the failure of the donee in trust to execute the trust. *Sickles v. City of New Orleans*, 80 Fed. R. 868.

pants, the mental condition of the donor at the instant of delivery, and the relations then existing between him and the donee, are all relevant, and should receive the closest scrutiny.

The burden of proof to establish every necessary fact is on the donee,¹ and, while the gift may be established by *his evidence alone*, if it is strong and uncontradicted, there is usually some necessity for corroboration.²

The declarations of the donor made to the donee or to those who are with him at the time of the delivery of the article given are admissible.³ And a presumption of the acceptance of the gift by the donee arises from the fact that he will be benefited thereby.⁴ It is usually requisite that the donor should have sufficient mental capacity to understand the character of

¹ Conklin v. Conklin, 20 Hun (N. Y.), 278.

² Bloomer v. Bloomer, 2 Bradf. (N. Y.) 319; Westerlo v. De Witt, 35 Barb. (N. Y.) 214; Rockwood v. Wiggins, 16 Gray (Mass.), 402; Devlin v. Farmer, 9 N. Y. Supp. 530; In re Wiegel's Estate, 28 N. Y. Supp. 95, 76 Hun, 462, 31 Abb. N. C. 159; Flood v. Cain, 29 N. Y. Supp. 156, 78 Hun, 378; Gibbs v. Carnahan, 25 N. Y. Supp. 564, 28 id. 1135; In re Donaldson's Estate, 158 Pa. St. 292, 27 Atl. R. 959; Thomas' Adm'r v. Lewis, 89 Va. 1, 15 S. E. R. 389. "The civil law requires five witnesses to establish such a gift; a will requires two with us. It is difficult to suppose that it was not by an oversight that the legislature made no provision respecting gifts of this sort; but, though our law does not define the number of witnesses required, it is laid down in all the cases, where judges have commented on the evidence necessary to sustain a donation *causa mortis*, that it must be established by *clear* evidence. The proof must be more than is required merely to turn the scale in favor of one of two equally probable conclusions." McConnell v. Murray, 3 Irish Eq. R. 465. That the burden of proof is on the donee to establish all the essential facts constituting the gift,

see Lewis v. Merritt, 118 N. Y. 386, 21 N. E. R. 386; Farian v. Weigel, 76 Hun (N. Y.), 462, 463; Devlin v. Bank, 125 N. Y. 756; Bick v. Reese, 3 N. Y. Supp. 757; Savings Bank v. Look, 95 Md. 7, 13-15; Hebb v. Hebb, 5 Gill (Md.), 506; Morse v. Meston (Mass.), 24 N. E. R. 916; Conklin v. Conklin, 20 Hun (N. Y.), 278, 280; Smith v. Smith (Va.), 23 S. E. R. 280; Parker v. Marston, 27 Me. 196, 205; Boudreau v. Boudreau, 45 Ill. 480; Smith v. Downey, 3 Ired. (N. C.) Law, 130.

³ Dean v. Dean, 43 Vt. 337, 343. Cf. Hunter v. Hunter, 19 Barb. (N. Y.) 631.

⁴ De Levillain v. Evans, 39 Cal. 120, 122; Devo v. Dye, 123 Ind. 321, 24 N. E. R. 321; Darland v. Taylor, 52 Iowa, 503, 506; Callanan v. Clement, 42 N. Y. Supp. 514; Reynolds v. Reynolds, 45 N. Y. Supp. 338; Leyson v. Davis, 17 Mont. 220, 42 Pac. R. 775; In re Wise (Pa., 1897), 37 Atl. R. 936. Evidence that when the donee produced the note at the request of a legatee she said that it was hers by gift is admissible to rebut an inference against her ownership of the note from the circumstance of the production of it, though incompetent as evidence of the gift. Harris v. Cable (Mich., 1897), 71 N. W. R. 531.

his act. This will usually be presumed in the absence of evidence to the contrary.¹ But if he is proved to have been lacking in mental capacity, or if it appears that the gift was procured by fraud or deception, or under duress, it will be set aside.² In conclusion it may be said that a legacy to the donee will be presumed to be in satisfaction of a prior gift *causa mortis*. But the donee may always attempt to prove by parol evidence that the testator intended that he should take both the gift and the legacy.³

¹ Van Dusen v. Rowley, 8 N. Y. 358.

² Todd v. Grace, 33 Md. 188; Samuel v. Marshall, 3 Leigh (Va.), 568.

³ "A *donatio mortis causa* must be completely executed precisely as is required in the case of a gift *inter vivos*, subject to be divested by the happening of any of the conditions subsequent; that is, upon actual revocation by the donor, by his surviving the donee, by the occurrence of a deficiency of assets necessary to pay the debts of the donor. If the gift does not take effect as a complete transfer of possession and title, legal or equitable, it is a testamentary disposition, and good only if made and

proved as a will. . . . The instrument transferring a chose in action must be the evidence of a subsisting obligation and be delivered to the donee, so as to vest him with an equitable title to the fund it represents and to divest the owner of all present control over it, absolutely and irrevocably, but upon the recognized conditions subsequent. A delivery which empowers the donee to control the fund only after the death of the donor, when by the instrument itself it is presently payable, is testamentary in character and not good as a gift." Basket v. Hascall, 107 U. S. 609, 610, 614.

CHAPTER XXXIX.

ANNUITIES.

§ 762. Annuities defined and distinguished from rent charges and legacies.

763. An annuity in general terms presumed to be given for life only.

764. Language by which an annuity in fee is created — Rules regulating the descent of perpetual annuities.

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770. Annuities payable while the annuitant remains unmarried or while she is living separate from her husband.

§ 762. **Annuities defined and distinguished from rent charges and legacies.**—An annuity may be defined as a sum of money directed to be paid yearly, or at stated times during the year, and which is to be paid to a person and his heirs, or to a man for a term of years, or for his life; and which, when created by a will, is payable primarily out of the personal estate of the testator;¹ for it should be particularly noted that an annuity which is bequeathed in general terms is a general legacy;² like a legacy it is *payable primarily out of the personal property.*³ And the word “legacies,” when it is used in a will,

¹ Coke, Litt. 144b; 3 Kent, p. 460; 2 Bl. Com., p. 40.

² *Ante*, §§ 390, 391.

³ *Horton v. Cook* (1840), 10 Watts (Pa.), 124, 127; *In re Hanbest*, 18 Pa. Co. Ct. R. 534; *Cornfield v. Wyndham*, 2 Collyer, 184, 187; *Sibley v. Perry*, 7 Ves. 522, 534; *Swift v. Nash*, 2 Kea. 20. Where the testator bequeaths annuities to A., and gives the residue of his property to B. *after*

the payment of legacies and annuities, the annuitants are not entitled to have the residue converted, and a sum to pay the annuities invested in securities approved by the court. They are entitled to have their annuities secured; as, for example, by a mortgage on the real estate of the testator. *In re Parry*, L. R. 43 Ch. Div. 570.

must be construed to include annuities.¹ The will may expressly or by implication provide that if the personal property shall prove insufficient for the purpose by reason of it being depleted to pay the debts of the testator or other legacies, the annuities shall be payable out of the proceeds of the real estate not specifically devised,² or out of the rents of property given specifically.

The payment is then a rent charge, which differs from an annuity, with which it is often confounded,³ in that it is a yearly payment which constitutes a burden or charge *upon a particular piece of land*, or on land which is comprised in a residuary or general devise, and which is payable out of the net rents and profits of that particular land only. A yearly payment, which is directed by the testator to be made, and whose character is doubtful, will not be presumed to be a general annuity rather than a rent charge, or an annuity which is chargeable upon a particular fund of personal property, unless the intention of the testator to make it chargeable is plainly apparent from the language of the will.⁴

A charge in favor of A., imposed upon lands devised to B., will be a lien upon the net profits of the lands into whose hands soever the lands may come, either by descent or by purchase. Every purchaser of the lands, whether he acquire them by a sale or a mortgage, takes them *cum onere*, and is conclusively presumed to have constructive notice of the charge from the fact that he derives his title from one who takes under the will by which the charge is created, and the latter is also conclusively presumed to have actual notice of the charge.⁵ If

¹ Rudolph's Appeal, 10 Pa. St. 34 (1848); In re McComb, 4 Brad. (N. Y.) 152; Cornfield v. Wyndham, 2 Collyer, 184, 187.

² Kreemer v. Trust Co., 29 S. W. R. 634; Pierrepont v. Edwards, 25 N. Y. (1862), 125, 128; Nash v. Taylor, 83 Ind. 347, 349; Smith v. Fellows, 131 Mass. 20, 22; Davis' Appeal, 83 Pa. St. 348, 353; Mullins v. Smith, 1 Drew. & Sm. 204, 211; Baker v. Baker, 6 H. L. Cas. 616, 632; Bromley v. Wright, 7 Hare, 334, 340; Dickerman v. Edginger, 32 Atl. R. 41, 168 Pa. St. 240.

³ 2 Black. Com., p. 40.

⁴ De Haven v. Sherman, 131 Ill. 115 (1889), 22 N. E. R. 951; Merritt v. Buckman, 77 Me. 253, 259; Owens v. Clayton, 56 Md. 159; Robinson v. Townshend, 3 Gill & J. (Md.) 413, 424; Smith v. Fellows, 131 Mass. (1881), 20, 22; Wyckoff v. Wyckoff, 48 N. J. Eq. 113, 21 Atl. R. 287; Larkin v. Larkin, 17 R. L. (1891), 461, 23 Atl. R. 19; Dickin v. Edwards, 4 Hare, 273, 276.

⁵ Nash v. Taylor, 83 Ind. 347; Heslop v. Gatton, 71 Ill. (1874), 528; Bugbee v. Sargent, 23 Me. 269, 271;

the annuitant permits or ratifies a sale of a part of the land, the purchase-money for which is to be appropriated by the devisee of the land for his own use, and accepts as security for his rent charge a lien on the part of the land unsold, he cannot, in case the land upon which he has a lien fails to produce a sufficient income to pay his annuity, follow the proceeds of the sale which has been invested in other land.¹

§ 763. **An annuity in general terms presumed to be given for life only.**—Whether the payment of an annuity shall be confined to the life of the annuitant, or shall continue after his death to his heirs or personal representatives, depends on the intention of the testator. The general rule by which a devise in indefinite terms is presumed at common law to be for the life of the devisee is applicable to the gift of an annuity.² Thus, if the testator gives an annuity to A. in general terms; *i. e.*, if the will does not expressly indicate the period during which the annuity is to be paid, it will be presumed that the testator intended it to continue only for the life of A.³ But where a testator, giving an annuity in general terms, directs that his whole estate shall be distributed *at the expiration of ten years after his decease*, the rule does not apply, and it will be presumed that the payment of the annuity is then to cease.⁴ So, also, a direction by the testator as follows: “I order \$500 per

Quimby v. Frost, 61 Me. 77; Nudd v. Powers, 136 Mass. 273, 277; Amherst Coll. v. Smith, 134 Mass. 546 (1883); Thayer v. Finnegan, 134 Mass. 62, 66; Aldrich v. Blake, 134 Mass. 582, 586; Veazey v. Whitehouse, 10 N. H. 409, 411; Wyckoff v. Wyckoff, 48 N. J. Eq. 113, 21 Atl. R. 287; Redfield v. Redfield, 12 N. Y. S. 831, 59 Hun. 620, 126 N. Y. 466; Birdsall v. Hewlett, 1 Paige (N. Y.), 32, 34; Lupton v. Lupton, 2 Johns. Ch. (N. Y.) 623; Rogers v. Ross, 4 Johns. Ch. (N. Y.) 271; Keiser v. Western, 2 N. Y. (1849), 500, 508; Loder v. Hatfield, 71 N. Y. (1877), 92, 97; Ripple v. Ripple, 1 Rawle (Pa.), 386; Appeal of Davis, 83 Pa. St. 348; Gilbert's Appeal, 85 Pa. St. 347, 351; *ante*, § 403.

¹ Tabb v. Tabb, 82 Va. 43.

² *Ante*, § 679.

³ Pierrepont v. Edwards, 25 N. Y. 128, 132, 134; Wagstaff v. Lowerre, 23 Barb. (N. Y.) 209, 217; In re Casten, 8 N. Y. S. 9; Hedges v. Harpur, 3 De Gex & J. 128, 137; Potter v. Baker, 13 Beav. 273; Cleveland v. Cleveland (Tex.), 30 S. W. R. 825; Armstrong's Appeal, 63 Pa. St. 312; Welch's Appeal, 28 Pa. St. 363; Newton v. Stanley, 28 N. Y. 61; Giddings v. Seward, 16 N. Y. 365; Acton v. Acton, 1 Mer. 178; Paget v. Huish, 1 Hen. & M. 663; Mann v. Copland, 2 Madd. 223; Vickers v. Pound, 6 H. L. Cases, 885; Yates v. Maddan, 3 De Gex, M. & G. 532; Mullins v. Smith, 1 Dr. & Sm. 204, 210.

⁴ Armstrong v. Crapo, 72 Iowa, 604 (1887), 34 N. W. R. 437. Compare Gage v. Wood (Mass., 1898), 50 N. E. R. 1040.

annum for ten years to be paid A.," is an annuity for ten years, or *for the life of A. if she die before the expiration of the ten years*, as there are no words of succession.¹ An annuity of \$400 per annum to be paid to A. "for and during the term of her natural life" for the support of herself and daughter, and when the latter shall attain majority her interest therein to cease, creates an annuity for the life of A., the words referring to the daughter and terminating her interest only.²

The rule that an annuity given in general terms is at least for the life of the annuitant is applied in determining the duration of annuities which are given expressly *for the education and maintenance of minors*. In the absence of an express direction that the payment is to cease with their majority, the annuity will endure for the lives of the minor children.³ An annuity may be granted payable during the life of another or during a term of years, and it then devolves upon the personal representatives of the annuitant for the next of kin, in case of his death during the period for which it is payable.⁴ Where an annuity was to A. for the life of B., on the death of A. before B. the annuity was directed to be paid to A.'s children, where the testator had given no express directions as to its disposal.⁵

§ 764. Language by which an annuity in fee is created — Rules regulating the descent of perpetual annuities.—An annuity which is devised with words of inheritance, as to A. *and his heirs*, or to A. *and the heirs of his body*, is a perpetual annuity. On the death of A. it will go to his heirs by descent, to the exclusion of his personal representatives. Such an annuity is regarded as an hereditament and goes to the heirs of the annuitant.⁶ But inasmuch as a perpetual annuity, though it is an hereditament, was by the rules of the common law not within the statute *de donis*, by which all limitations to heirs of

¹ *Bates v. Barry*, 125 Mass. 83, 84.

² *In re Engle's Estate*, 15 Pa. Co. Ct. R. 26, 31 Atl. R. 76, 166 Pa. St. 280.

³ *Wilkins v. Joddrell*, L. R. 13 Ch. Div. 564, 570.

⁴ *Metropolitan Trust Co. v. Seaver*, 17 Misc. R. 466; *In re Ord*, L. R. 13 Ch. Div. 22, 25.

⁵ *Stevenson's Ex'rs v. Stevenson*, 91

Ky. 50 (1890), 14 S. W. R. 955. *Con-*

tra, *Kelly v. Casey*, 17 N. Y. S. 86, 62 Hun, 467, Barrett, J., dissenting. If this case had been taken to the court of appeals it would probably have been reversed, as it is undoubtedly erroneous.

⁶ *Turner v. Turner*, Amb. 776, 782;

3 Kent, pp. 460, 471; Coke, Litt. 2, a.

the body were turned into fees tail in the first taker, a limitation of a perpetual annuity to A. and the heirs of his body did *not create a fee tail, but gave him a fee conditional, which became absolute upon his having issue.*¹ On the other hand, an annuity to "*A. forever,*" *without words of inheritance,* is personal property, and on the death of A. devolves upon his personal representatives.² And in either case a perpetual annuity, whether with or without words of inheritance, is neither within the statutes of mortmain, nor was it in England liable to forfeiture for treason.³

A perpetual annuity may, even independently of statute, be created in a will without words of inheritance,⁴ though words of inheritance may be required in a grant. Thus, if the testator, giving an annuity in general terms to A., directs it should go over in case he should die without issue,⁵ or if he confers the full power of disposing of the fee of the annuity upon the annuitant,⁶ or uses other language which indicates that he intends the payment of the annuity to continue indefinitely after the death of the first taker, it will be perpetual.⁷

In the case of a gift of an annuity to A. *in fee*, and, if A. shall die without leaving issue him surviving, then to B. in fee, the limitation to B. is valid as an executory devise after a definite failure of issue, though annuities given by will are customarily governed by and construed according to the rules regulating devises.⁸ The rule of construction, by which the words "*leaving issue*" are construed "*having issue,*" so that the parent is vested with a fee simple *upon having issue,*⁹ though he may die leaving *no* issue, is not applicable to annuities. An annuity to A. in general terms, with a gift over on his death "*without leaving issue,*" is defeated by his death

¹ Co. Litt. 2, a.

² Taylor v. Martindale, 12 Sim. 158, 161.

³ 2 Black, Com., p. 40; Coke, Litt. 20, 144; Potter v. Baker, 2 Eng. L. & Eq. 92, 94, 13 Beav. 273; Parsons v. Parsons, L. R. 8 Eq. 260.

⁴ Ante, § 684.

⁵ Hedges v. Harpur, 3 De Gex & J. 129; Pawson v. Pawson, 19 Beav. 146.

⁶ Robinson v. Hunt, 4 Beav. 450.

⁷ Drew v. Barry, L. R. 7 Eq. 413;

Mansergh v. Campbell, 25 Beav. 544, 3 De Gex & J. 232; Stokes v. Heron, 12 Cl. & Fin. 161, 179, 190, 192; Kerr v. Hospital, 2 De Gex, M. & G. 575, 589. In this last case the testator directed his residuary estate to be laid out in the purchase of an annuity for a hospital.

⁸ Bradhurst v. Bradhurst, 1 Paige (N. Y.), 331.

⁹ Ante, § 363, p. 499, and § 566.

leaving no issue surviving, though he had issue which did not survive.¹

§ 765. The circumstances under which the annuity may be commuted — The effect of the death of annuitant where payment is postponed.— If the testator directs an annuity *to be paid out* of a specified portion of his estate, or *to be paid generally* by trustees or executors, they have no implied power to commute it for a gross sum.² But when the testator directs his executor or a trustee to *invest a stated sum in the purchase of an annuity*, the sum which is thus directed to be paid is a pecuniary legacy vesting at the death of the testator, and the person for whom the annuity is to be purchased may consent or demand that it be paid to him at once.³ If the purchase and payment of the annuity are postponed by the trustee for the convenience of the estate, or are to take place after the termination of a life estate, the annuity being vested, and the annuitant dies before it is purchased, the sum which was to purchase the annuity must then be paid to his heirs or personal representatives,⁴ according to the character of the annuity which was to be purchased.⁵

§ 766. The apportionment of annuities.— At the common law and in equity, in the absence of statute, life annuities are never apportionable. If the person to whom the life annuity is devised shall die between the dates upon which the annuity is payable, his personal representatives cannot recover that portion of the annuity which was due the annuitant from the time of the last payment to the date of his death.⁶

But life annuities which are payable to the widow of the

¹ In re Hemingway, L. R. 45 Ch. Div. 453.

² Bayley v. Bayley, 9 Ves. 6.

³ Yates v. Compton, 2 P. Wms. 308; Palmer v. Crauford, 3 Sw. 482, 488; Day v. Day, 1 Drew. 569, 574; Yates v. Yates, 28 Beav. 637, 641; Ford v. Batley, 17 Beav. 303; In re Brown's Will, 27 Beav. 329; Dawson v. Hearn, 1 Russ. & My. 606.

⁴ Barnes v. Rowley, 1 Ves. 305; Dawson v. Hearn, 1 Russ. & My. 606, 612, 613; Palmer v. Crauford, 3 Sw. 482, 483; Hunt v. Furber, L. R. 3 Ch. Div. 285; Pearson v. Dolman, L. R. 3 Eq.

315; Day v. Day, 1 Drew. 569, 574; Bayley v. Bishop, 9 Ves. 6.

⁵ This rule is of manifest advantage to the representatives of a life annuitant who dies before the annuity is purchased. They stand in his place, and his right to elect between the annuity and the gross sum passes to them. Of course if he has elected to take the annuity and it has been purchased, and he has received it for his life, they cannot claim the gross sum.

⁶ Tracy v. Strong, 2 Conn. (1818), 659, 664; Heizer v. Heizer, 71 Ind. (1880), 526, 529; Nading v. Nading,

testator, particularly if they are given *in lieu of dower*, or if given *for her support*, are in many respects favored by the law. They are apportionable upon the death of the annuitant, and the amount then due to her should be paid to her personal representatives.¹ And many authorities maintain that an annuity for her life which is payable to a married woman, who is living apart from her husband, for *her support and maintenance*, or an annuity for the *support and maintenance of minor children*, is likewise apportionable.²

§ 767. **When annuities are payable.**—An annuity, like a legacy, in the absence of a contrary intention clearly expressed, vests at the death of the testator. Independently of statute the first payment should be made at the expiration of one year after that date, unless the testator has directed that it should be made at another time.³ This is so even where the will directs a conversion of land into money which is to constitute a fund from the income of which the annuity is to be paid, and a sale is not made until sometime after the death of the testator.⁴ But an annuity payable to the widow of the testator, or to a minor for his maintenance and support, constitutes an exception to this rule, and *its payment should begin with the death of the testator*.⁵

137 Ind. 261, 280; *Wiggin v. Swett*, 6 Metc. (47 Mass.) 194, 201; *Chase v. Darby* (Mich., 1896), 68 N. W. R. 159; *Manning v. Rudolph*, 4 N. J. L. (1818), 144; *In re Lackawanna, I. & T. Co.*, 37 N. J. Eq. 126; *Griswold v. Griswold*, 4 Bradf. (N. Y.) 216; *Irvine v. Rankine*, 13 Hun (N. Y.), 147, 149; *Kearney v. Cruikshank*, 117 N. Y. 95 (1889), 22 N. E. R. 580; *Dubbs v. Watson*, 2 Pa. Dist. R. 115; *Waring v. Purcell*, 1 Hill (S. C.) L. 199; *Hay v. Palmer*, 2 P. W. 501; *Jenner v. Morgan*, 1 P. W. 392; *Franks v. Noble*, 12 Ves. 484, 490; *Weigall v. Brome*, 6 Sim. 99; *Ex parte Smith*, 1 Sw. 349; *Leathey v. French*, 8 Ir. Ch. 401; *Thacker's Trusts*, 28 L. T. (N. S.) 56. In some of the states annuities are apportionable by statute. See Acts N. Y. 1875, ch. 542.

¹ *Richardson v. Hall*, 124 Mass. 228,

236; *Moore v. Alden*, 80 Me. 301; *Blight v. Blight*, 51 Pa. St. 420; *Rhode Island Hospital Trust Co. v. Harris* (R. I.), 37 Atl. R. 701; *Irvine v. Rankine*, 13 Hun (N. Y.), 147, 149; *Parker v. Seeley* (N. J., 1897), 38 Atl. R. 280.

² *Sweigert v. Frey*, 8 S. & R. (Pa.) 299; *In re Lackawanna Co.*, 37 N. J. Eq. 126; *Howell v. Hanforth*, 2 W. Bl. 1016.

³ *Crew v. Pratt* (Cal., 1897), 51 Pac. R. 44, 46; *Kearney v. Cruikshank*, 117 N. Y. 95; *Cleveland v. Cleveland* (Tex.), 30 S. W. R. 825; *McDonald's Appeal* (Pa., 1888), 12 Atl. R. 478; *In re Eichelberger's Estate*, 170 Pa. St. 242; *ante*, §§ 424-426.

⁴ *Curran v. Green*, 18 R. I. 329, 27 Atl. R. 596.

⁵ *Weld v. Putnam*, 70 Me. 209; *Craig v. Craig*, 3 Barb. Ch. (N. Y.) 76.

An annuity, unless otherwise stated, is payable yearly, and the court may insert the words "*per annum*" in a direction to pay an annuity, where the manifest intention of the testator calls for it.¹ The same general rules are applicable to the payment of sums of money which are not annuities properly speaking, but rent charges payable by devisees of land.²

The testator may, and in many cases does, direct that the annuity shall be paid at a particular time or at certain periods, as quarterly, monthly, or otherwise. In case of abundant personal assets to meet debts and legacies, an executor may be justified in paying an annuity not charged on land, which the testator has directed him to pay monthly, at the expiration of the first month after the death of the testator;³ but he does so at his own risk, and may have to refund it if there shall be a deficiency of assets. The customary and better rule is to make the first payment at the end of one year from the death of the testator, whether the annuity be payable quarterly or otherwise.⁴

¹ *Hellermann's Appeal*, 115 Pa. St. 120, 8 Atl. R. 768.

² An annuity payable for seven years in semi-annual instalments, "the first as soon after my decease as sufficient funds for the purpose shall come into the possession of the executors, and the remaining ones at the end of every six months thereafter," begins to run at the decease of the testator under statute (Civil Code, sec. 1368) providing that annuities commence at the decease of the testator. *Crew v. Pratt* (Cal., 1897), 51 Pac. R. 44.

³ *Waring v. Purcell*, 1 Hill (S. C.) Eq. 193. Where an annuity is to be paid on the first day of April in each year, the first payment must be made on that first day of April which occurs after the annuity has vested, no matter how soon that may be, if it be at least one day after the devise has gone into effect. *Cray v. Herder*, 46 N. J. Eq. 416, 19 Atl. R. 385.

⁴ *Hall v. Hall*, 2 McCord (S. C., 1827),

Eq. 281; *Griswold v. Griswold*, 4 Bradf. (N. Y.) 216; *McDonald's Appeal* (Pa., 1888), 12 Atl. R. 478; *Storer v. Prestage*, 3 Madd. 167; *Williams v. Wilson*, 5 N. R. 267; *Gibson v. Bott*, 7 Ves. 96, 97; *Astley v. Essex*, 6 L. R. Ch. App. 898; *Rawson v. McCausland*, 7 Ir. R. Eq. 284. *Contra*, *Wiggin v. Swett*, 6 Met. (Mass.) 194. In a recent case it was held that an annuity payable out of the income of real and personal property, but with no time fixed for its periodical payments, ought to be paid quarterly, upon the presumption that the rents, which composed the larger part of the fund upon which it was charged, were payable quarterly. *Reed v. Cruikshank*, 46 Hun, 219. But a legacy to the widow of "an income in cash of \$1,200 a year during her life" is payable annually, and not at periods during the current year at the discretion of the executors. *Anthony v. Anthony*, 11 Atl. R. 45, 55 Conn. 256.

§ 768. **Circumstances under which the corpus of a fund may be employed to pay an annuity — The payments of arrears from surplus income.**— The general rule is that a gift of the net rents or profits of the land, or of the interest or income of a sum of money, is a gift of the *corpus*.¹ But the gift of an annuity, though payable out of net income, or net profit, or annual profits, is a demonstrative legacy with a direction pointing out the source from which it is to be paid.² The only interest which the annuitant takes in the income and profits is *the amount which is directed to be paid to him*.

Whether the annuity shall be paid out of the fund itself, in case the net income or profits of the fund are insufficient to pay the annuity, depends wholly upon the intention of the testator as expressed in the will. Where the annuity is given in general terms (that is to say, where no particular fund is mentioned from which it shall be payable), it is a general legacy, and the annuitant may claim to have a sum set aside out of the *corpus* of the personal property left by the testator which will produce the annuity. The title of the residuary legatee is postponed to the claim of the annuitant.³ The same rule as to the liability of the personal property is applied where the testator directs the executor, *in general terms*, to purchase an annuity of an amount specified, or to invest a sum which will produce an annuity of a specified amount, and the executor invests what he considers a sum sufficient for that purpose, but which for any reason ultimately proves insufficient or inadequate to purchase the annuity mentioned. Under these circumstances, where the *corpus* of the personal property after the purchase of the annuity is devised to the residuary legatee, the *corpus* of the personal property will be liable for the payment of the annuity, so far as the income of the sum set aside proves insufficient.⁴ Here it may be remarked, in spite of some lack of

¹ See § 692.

² *Ante*, § 406.

³ *Richardson v. Hall*, 124 Mass. (1898), 228, 237; *Semple's Estate* (Pa., 1899), 42 Atl. R. 28; *Carmichael v. Gee*, 5 App. Cases, 588; *Gee v. Mahood*, L. R. 11 Ch. Div. 891, 897; *Wright v. Callender*, 2 De Gex, Mac. & G. 652, 656; *ante*, § 395. But a specific bequest

of all personal property to A., by implication gives the annuitant a right to be paid out of the real property. *In re Nathan's Estate*, 16 Pa. Co. Ct. R. 223, 4 Pa. Dist. R. 149; *Id.*, 36 W. N. C. 184.

⁴ *Boomhover v. Bassett*, 67 Vt. 327, 31 Atl. R. 838; *Merritt v. Merritt*, 48 N. J. Eq. 1, 21 Atl. R. 128; *In re*

harmony, that *it seems* that a gift of the interest on a sum of money named is not an annuity equal to the interest on such sum at the current legal rate of interest, but it is a legacy of the actual interest only. If the whole estate turns out less than the sum named, or if the interest actually received does not equal the interest calculated at the current rate, the annuitant is not entitled to have the deficiency made up out of the *corpus*. But he is actually entitled to the interest of the sum named whatever it may be.¹ If the executor is by the testator directed to pay an annuity of a certain amount out of the income of the personal property invested, or which he is directed to invest and hold as a special fund, with a gift to other persons than the annuitant of the surplus of the income beyond the payment of the annuity,² or if he is directed to divide the *corpus* among or pay it to others, *with all accumulations of the income*, at the termination of the annuity, the annuitant will be regarded in the nature of a life tenant; and in case of a deficiency in the annual income, he will not be entitled to have that deficiency made good out of the *corpus*,³ nor out of a subsequent surplus of the income.

But if the testator has made no distinct disposition of the surplus of the income, so that it devolves upon his next of kin as unbequeathed personal property, an annuitant, whose annuity has been diminished for several years because of the

Denis, 16 Pa. Co. Ct. R. 37, 169 Pa. St. 436, 32 Atl. R. 436; Curran v. Green, 18 R. L. 329, 27 Atl. R. 596; Bright v. Larcher, 3 De Gex & Jo. 148; Wright v. Callender, 2 De Gex, M. & G. 652, 655; May v. Bennett, 1 Russ. 370; Perkins v. Cooke, 2 Jo. & Hem. 393; Miner v. Baldwin, 1 Sm. & Gif. 522; In re Tucker (1893), 2 Ch. 519.

¹ Delaney v. Van Aulen, 84 N. Y. 16; Booth v. Amerman, 4 Bradf. (N. Y.) 129; Whitson v. Whitson, 53 N. Y. 47; In re Dewey's Estate, 46 N. E. R. 1039, 153 N. Y. 63, 67, reversing 31 N. Y. Supp. 255, 82 Hun, 426. *Contra*, Brimblecome v. Haven, 12 Cush. (Mass.) 511.

² Brewster's Appeal (Pa., 1888), 12 Atl. R. 470; Stelfox v. Sugden, Johns. (English), 235; Sheppard v. Sheppard,

32 Beav. 194; Darbon v. Richards, 14 Sim. 537.

³ Grinnell v. Baker, 17 R. L. 4 (1890), 23 Atl. R. 911; Einbecker v. Einbecker, 162 Ill. 267, 272, 275, 44 N. E. R. 426; Irwin v. Wollpert, 128 Ill. 527 (1889), 21 N. E. R. 501; De Haven v. Sherman, 131 Ill. (1896), 115; Security Co. v. Cone, 64 Conn. 579; Delaney v. Van Aulen, 84 N. Y. 16; Mason v. Robinson, L. R. 8 Ch. Div. 411; Cummings v. Cummings, 146 Mass. 501; Attorney-General v. Poulden, 3 Hare 555; Miller v. Huddleston, 17 Sim. 71, 3 Mac. & G. 513; Mitchell v. Wilton, W. R. 789; Baker v. Baker, 6 H. L. Cas. 616; Foster v. Smith, 1 Phil. 629; Forbes v. Richardson, 11 Hare, 344; Earl v. Billingham, 24 Beav. 445.

deficiency of income, is entitled, when the income subsequently proves more than sufficient, to have his arrears made good out of the surplus before its distribution among the next of kin.¹

Everything depends upon the language which has been employed by the testator. If, from his language, it is clearly apparent that he intended that a deficiency in the income should be made up out of the capital of the fund, the court will not hesitate to carry that intention into effect. Thus, for example, if he directs an annuity to be paid out of the income of the estate in such definite and absolute terms as to show that its payment is in no wise to depend upon the amount of the income, and then makes a general or residuary gift of the *corpus*, "*after the payment of the annuity*," or "*subject to*" its payment, it will be presumed that the *corpus* of the estate should be applied to paying the annuity.² Where the testator gives an annuity, and it clearly appears that it was his desire and intention to make a *definite and certain provision for the support of the annuitant*, the annuity is an absolute charge upon the *corpus* of the estate. In such a case its payment does not depend upon the amount of the income exclusively, though the testator may have given directions for investing the property, and may have alluded to its payment out of the income thus produced.³ This principle is particularly applicable to the case of an annuity payable to the widow of the testator, and to an annuity out of the income of the residue, where the residuary

¹ In re Chauncey, 119 N. Y. 77, 23 N. E. R. 448, reversing 6 N. Y. S. 183; Delaney v. Van Aulen, 84 N. Y. 16; Bradlee v. Andrews, 137 Mass. 50, 57; Graves v. Hicks, 11 Sim. 536, 555; Booth v. Colton, L. R. 5 Ch. 684; Taylor v. Taylor, L. R. 17 Eq. 324. Compare *contra*, Brewster's Appeal (Pa., 1888), 12 Atl. R. 467, 470.

² Comstock v. Herron, 5 C. C. A. 266, 6 U. S. A. 626, 55 Fed. R. 803; Nash v. Taylor, 83 Ind. 349; Lindsey v. Lindsey, 45 Ind. 552; Davis' Appeal, 83 Pa. St. 348, 353; Gilbert's Appeal, 85 Pa. St. 347, 351; Degraw v. Gleason, 11 Paige (N. Y.), 136; Shermerhorn v. Shermerhorn, 6 Johns. (N. Y.) Ch. 70; Lupton v. Lupton, 2

Johns. Ch. (N. Y.) 61; Justice v. Justice (N. J., 1898), 20 Atl. R. 208; Quinby v. Frost, 61 Me. 277; Curran v. Green, 18 R. I. 329, 27 Atl. R. 596; Picard v. Mitchell, 14 Beav. 103, 104; Hobson v. Neale, 17 Beav. 178, 183; Phillips v. Gutteridge, 4 De G. & Jo. 531, 536; Howarth v. Rothwell, 30 Beav. 516; Birch v. Sherratt, 2 L. R. Ch. App. 644; Gordon v. Bowman, 6 Madd. 342; Swallow v. Swallow, 1 Beav. 432; Playfair v. Cooper, 17 Beav. 187, 190; Addecott v. Addecott, 29 Beav. 460; Perkins v. Cook, 2 Jo. & Hem. 393.

³ Additon v. Snith, 23 Atl. R. 470, 83 Me. 551.

disposition which is to take effect after the death of the annuitant fails and the *corpus* goes to the next of kin as in intestacy.¹

§ 769. **Abatement of annuities.**—Whether the annuity is payable yearly or at some shorter interval, the amount which may be payable as a first instalment will not bear interest from the death of the testator.² If it is the manifest intention of the testator that the *corpus* or capital shall be applied to paying annuities in case of a deficiency in the income, and the capital also proves insufficient to pay all annuitants the full amounts due them, it must be apportioned among them *pro rata*, according to the value of their annuities.³ The value of the annuity of a deceased annuitant will be presumed to be the amount in which his annuity was in arrears at his death, and, if all are dead, the fund ought to be divided *pro rata* according to the amounts of the several arrears.⁴ In case all the claimants are living, the value of each annuity ought to be calculated as of the date of the death of the testator, and the fund divided in accordance therewith.⁵

§ 770. **Annuities payable while the annuitant remains unmarried, or while she is living separate from her husband.**—The general considerations applicable to devises and legacies upon condition that the beneficiary shall not marry, and which are elsewhere fully stated,⁶ are applicable to annuities which are payable while the annuitant remains unmarried. Thus, it is well settled that an annuity given by the testator to his widow while she remains unmarried or until her marriage is valid.⁷ And it has also been held that an annuity to a mar-

¹ In *re Cooper's Estate*, 147 Pa. St. 322, 23 Atl. R. 456; *Moore v. Alden*, 80 Me. 301, 14 Atl. R. 199. An annuity which is expressly directed to be paid out of any money of the estate which may come into the hands of the executor, and the first instalment of which is to be paid as soon after the decease of the testator as sufficient funds come into the hands of the trustee, is a charge upon the *corpus*. *Crew v. Pratt* (Cal., 1897), 51 Pac. R. 44, 46.

² *Anderson v. Dwyer*, 1 Sch. & L.

301; *Taylor v. Taylor*, 8 Hare, 120; *Torre v. Browne*, 5 H. L. Cas. 555; *Batten v. Earnley*, 2 P. Wms. 163; *ante*, § 425.

³ *Wroughton v. Colquhoun*, 1 De Gex & Sm. 357; *Todd v. Bielby*, 27 Beav. 356; *ante*, § 390.

⁴ *Todd v. Bielby*, 27 Beav. 353, 356.

⁵ *Todd v. Bielby*, 27 Beav. 353, 356; *Wilkins v. Rotheram*, L. R. 27 Ch. Div. 703; *Heath v. Nugent*, 29 Beav. 226.

⁶ *Ante*, § 494.

⁷ *Knight v. Cameron*, 14 Ves. 388;

ried woman, payable to her while she is living separate from her husband, if it is the sole intention of the testator to provide for her comfortable support and maintenance while she is deprived of a share in her husband's income, is valid where the parties were living apart at the date of the execution of the will.¹

Reynish v. Martin, 3 Atk. 330; *Clarke v. Parker*, 19 Ves. 13; *Crawford v. Thompson*, 91 Ind. 266; *Parson v. Winslow*, 6 Me. 169. it is competent for a man to give a single woman an annuity until she shall die or be married, whichever of these two events shall happen first.

¹ *Cooper v. Remsen*, 3 Johns. Ch. (N. Y.) 382, 521, 5 Johns. Ch. (N. Y.) 459. Compare cases cited under §§ 505, 506. In *Heath v. Lewis*, 3 De G., M. & G. 954 (1853), Bruce said: "It must be agreed on all hands that All men agree that if such a legatee shall marry the annuity would cease. 'During the term of her natural life, if she so long remains unmarried,' is the technical and proper language of limitation." *Ante*, §§ 505, 506.

CHAPTER XL.

TESTAMENTARY USES, TRUST ESTATES AND POWERS.

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| <p>§ 771. The origin and early employment of uses.</p> <p>772. The exceptions to the English statute of uses — Statute does not apply to chattels.</p> <p>773. Active uses are not executed by the statute.</p> <p>774. Uses for the benefit of married women are not executed by the statute.</p> <p>775. A use upon a use is not executed by the statute.</p> <p>776. The statute of uses in the United States.</p> <p>777. Future and executory uses.</p> <p>778. Shifting, springing and contingent uses.</p> <p>779. The law of modern trusts.</p> <p>780. Statutes regulating trusts in the United States.</p> <p>781. Language by which a trust may be created — The duration of the estate taken by the trustee.</p> <p>782. Trusts to sell land — When power of sale only is created.</p> <p>783. The power of an executor to sell lands.</p> <p>784. The execution of a power of sale by surviving executors.</p> <p>785. The acceptance of the trust.</p> <p>786. The power of equity to appoint a trustee.</p> <p>787. The removal of trustees.</p> <p>788. The merger of the equitable and the legal estates.</p> <p>789. The protection and preservation of the trust property by the trustee — The degree of care required.</p> <p>789a. A trustee cannot purchase the trust property — The</p> | <p style="text-align: right;">remedy of the <i>cestui que trust</i>.</p> <p>§ 790. The liability of trustees for investment of personal property in trust.</p> <p>791. The liability of a purchaser for the application of the trust property.</p> <p>792. Definition of a precatory trust.</p> <p>793. Particular examples of language which is testamentary, and not precatory merely.</p> <p>794. The modern rule as to the creation of precatory trusts.</p> <p>795. The relations between the trustee and the testator.</p> <p>796. Where the discretion is absolute no trust is created.</p> <p>797. Precatory words in a devise to a person for himself and children.</p> <p>798. Powers of appointment defined and classified.</p> <p>799. Language necessary to be used to create a power.</p> <p>800. The mode of the execution of the power.</p> <p>801. The execution of a power of appointment by will by a general devise.</p> <p>802. Equitable remedies for the non-execution of powers.</p> <p>803. The fraudulent and improper and excessive execution of powers.</p> <p>804. The illusory execution of powers.</p> <p>805. The extinguishment of powers.</p> <p>806. Who may be the donee of a power.</p> <p>807. Powers when void for remoteness.</p> |
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§ 771. **The origin and early employment of uses.**—An extended discussion of the origin and early history of uses and trusts in England, or of the rules of equity which regulated them at their inception, would obviously be altogether out of place in a treatise of this character. The student who may be desirous of entering upon a more complete investigation of this subject is referred to the numerous excellent treatises in which it is explained in the fullest detail.¹ All that can legitimately be attempted in this work is to treat concisely of the rules and principles of equity which are applicable to testamentary trusts and powers as they now exist in the United States of America, not only in those states where the English statute of uses has been, either expressly or by implication, re-enacted, but also in other states where other statutes regulating trusts and powers, and defining those which are valid, exist.

In order to understand the law of trusts as it exists at the present day, it is necessary to preface our inquiry into that subject by a short consideration of the events which preceded and led up to the enactment of the English statute of uses. In the first place it will be necessary to call the reader's attention to the fact that for ages in England the only way of conveying freehold land or other corporeal hereditaments was by a feoffment made with livery of seizin upon or in view of the land itself. This involved an actual transmutation of the possession in every case where an estate in freehold was created in land,² whether for life, in fee simple or in fee tail.

The person who was enfeoffed of the land must be the actual owner, and he must continue in possession either in person or by means of a subtenant. His powers of alienation were originally greatly restricted, and the burdens which were placed upon him were extremely onerous. The feudal law prohibited the alienation of a feud from one person to another without the consent of the lord, lest a feeble, cowardly or unfriendly tenant might be substituted for one in whose strength and bravery the lord had confidence. Nor could the tenant alien, *even with the lord's consent*, until he had procured the consent of his heir apparent as well, who was assumed to have an inter-

¹ 1 Spence, Equity Jurisprudence, et seq. See also Pomeroy and Story p. 452 et seq.; Lewin on Trusts, § 1 on Equity.

² 2 Black., p. 314.

est in the fee which entitled him to be heard.¹ And though at a very early date, after the introduction of feudal tenures, a man was permitted to alien land which he had himself purchased without the consent of his heir, if it were limited to him and his assigns, it was not until the thirteenth year of Edward I. that lands were made generally alienable by the statute *quia emptores*.² And it may also be noted that from the date of the Norman conquest of England down to the passage of the statute of 32 Henry VIII., lands in England were not devisable.³ In view of the stringent character of these restrictions upon the power of alienation, it is not to be wondered at that a method was soon devised by which they could in part at least be evaded.

The land which it was intended to dispose of was transferred by a feoffment with livery of seizin to some person in whom the feoffor had confidence, and this person held it to the use of the former owner. The feoffee to use had the legal title to the land. He was able in law to maintain an action to protect the possession of the land against trespassers and against waste and disseisin. He might, at common law, maintain ejectment against the feoffor to use, and he was under no obligation to the latter, or to any person claiming under him, except so far as he was bound in conscience to pay the rents and profits to the actual owner of the land, or to convey the legal title to some person appointed by the *cestui que use*. The fact that a large amount of the land had been enfeoffed to persons for the benefit of the various ecclesiastical corporations in order to avoid the prohibition imposed by *Magna Charta*, and the statutes of mortmain, upon the holding of land by religious corporations, no doubt first induced the court of chancery to assume jurisdiction of this matter. The *cestui que use* had no remedy at law for a refusal on the part of the feoffee to use to dispose of the legal title vested in him for the benefit of the former. But the ecclesiastics, who then controlled the court of chancery, following the precedents of the civil law, by means of the writ called the writ of subpoena, which issued under the seal of the chancellor and was returnable before him, at length found an efficient method of enforcing the use where the

¹ 2 Black., pp. 287, 288.

³ *Ante*, § 3.

² 2 Black., p. 288.

feoffor was inclined to reject his conscientious obligations. The feoffor was summoned to appear in court and there to answer under oath how he had disposed of the rents and profits of the land, and he might then be compelled to transfer the land to the person indicated by the *cestui que use*.¹

For it must be remembered that the ecclesiastics, who at that period controlled the court of equity, applied, whenever it was possible to do so, the rules and maxims of the Roman civil law, of which the *fidei commissum* formed a component part.² We may well believe that they were by no means adverse, under the pretense of enforcing the conscientious obligation which had been imposed upon the feoffee to use, to assert and exercise a jurisdiction which gave them so large an influence over the estates and actions of the land-owning class, which at that date had a monopoly of the wealth of the community. During the protracted wars in which England was involved with the neighboring states of France and Scotland, and in the ensuing civil discord between the houses of Lancaster and York, with their resultant bloodshed and insecurity to life and property, uses grew to be universally resorted to for the purpose of evading the forfeiture of land which was incident to an attainder or a conviction of treason, and for the purpose of preserving to their posterity the landed estates of those persons who ventured their lives in the various struggles waged for the possession of the government. And though it was at first held that chancery could enforce the use *only as against the original person enfeoffed or intrusted* with the legal title, it was soon decided that a purchaser from him, if he had not parted with value, or if he took with notice of the use, and also the heir of the feoffee, took the legal title subject to the use, which would be enforced against him as a binding obligation in a court of equity.³ And, on the other hand, the widow and the husband of the feoffee to use, not being parties to the feoffment, while they were not obligated to perform the use, were unable to enforce, as regards the property in the use, the rights of dower and curtesy which they possessed in land at common law.

¹ Plowden, 352; 2 Black. Com., p. 328; Com., p. 328; 1 Spence, Eq. Juris, § 436.
1 Spence, Eq. Jur., § 455.

² 2 Inst. 2, tit. 23; Sandar's Justinian, §§ 337, 338 et seq.; 2 Black. Dig. 341.
³ 2 Black. Com., p. 329; 1 Cruise,

It followed, as a result of the co-operating causes above mentioned, that, by the time of the reign of Henry VIII., nearly the whole landed wealth of the kingdom had been conveyed to uses over which the court of chancery alone had jurisdiction, and concerning which an extremely intricate, though logical and orderly, system of rules and principles had been formulated, by which the *cestui que use* enjoyed all the advantages with none of the disadvantages which are attendant upon a common-law estate. The consequence of this was that legal titles to land were thrown into inextricable confusion. The heir, who was favored at the common law, could be unjustly, and often was unintentionally, disinherited. The king, by the employment of uses, lost his forfeiture for treason; and the feudal landlord his right to wardships and to reliefs. The common-law rights of dower and of curtesy were often destroyed and always imperiled. At length, to remedy these and other evils deemed to be intolerable, the statute of 27 Henry VIII., c. 10, commonly called the Statute of Uses, was passed with the intention on the part of parliament of utterly abolishing uses, and transferring the legal title from the feoffee to the *cestui que use*.¹

§ 772. The exception to the English statute of uses — Statute does not apply to chattels.— The advantages of uses in allowing the creation of estates in real property which were not permitted according to common-law rules were so manifest, and so greatly exceeded the evils to which uses had given rise, that the courts were prompted to construe the statute most strictly. The statute of uses, too, was remedial. Owing to this strict construction, uses, instead of being absolutely abolished by the statute, were only confirmed and strengthened by it, so that, under the name of trusts, they continued to exist in many cases, and still exist to this day. It is impossible, be-

¹The material part of this statute is as follows: "That where any person or persons stood or were seized of honours, . . . lands, tenements . . . or hereditaments . . . to the use, confidence or trust of any other person or persons, or body politic, . . . all and every such person or body politic that have . . . such use, confidence or trust in fee simple or fee tail . . . shall stand and be seized, deemed and adjudged in lawful seizin, estate and possession, . . . in the law, of and in such estates as they had in the use, confidence or trust . . . and such estate shall be in him and them after such quality, manner, form and condition as they had before in or to the use."

cause of the limited space at our command, to enumerate with any completeness of detail all the refinements and technicalities by which the operation of the statute of uses was evaded, and the equitable doctrine of trust estates erected into its present symmetrical proportions. The intention of the legislature was to utterly abolish all uses. This was to be done by executing the use,—that is to say, by transferring the possession from him who had the legal seizin, *i. e.*, the feoffee to use, to him who had the use, so that the *cestui que use* was to be made the *owner of the land both at law and in equity*.¹ But the courts, in construing the statute, very soon decided that it *had no application to any chattel interest*. The express terms of the statute refer only to estates of which a man “*stood or was seized*.” At common law livery was necessary to give seizin, and no livery could be made of any estate which was less than a freehold.² Hence the statute was construed *not* to execute uses *limited in leasehold* estates of land, but only estates for life and estates of inheritance, of which one could be seized.³ Hence, if the estate in the feoffee to use is for a term less than a freehold, he will be still treated as a trustee; and the use will remain unexecuted so far as his estate extends, although the beneficial and equitable interest in the *cestui que use* is a freehold.

§ 773. **Active uses are not executed by the statute.**—All uses and trusts are, irrespective of any statute, either active or passive in their nature. Where the feoffee to use has any active duty to perform, the use is active and it is not executed by the statute of uses. If the feoffee to use were by the feoffor directed to *pay the net income* and profits of land to A. after paying and *deducting taxes, rates and repairs*,⁴ or if he were directed to *apply the rents* and profits to the support⁵ or to the maintenance and education of the beneficiary,⁶ or if he is to *receive and pay* the rents to A.,⁷ or if he is to pay annuities

¹ 2 Black. Com., p. 333.

² 2 Black. Com., p. 311.

³ 1 Cruise, Dig., pp. 350, 351, 353; Prest. Estates, 190; 1 Spence, Eq. Juris., § 466 et seq.

⁴ Shapland v. Smith, 1 Bro. C. C. 74.

⁵ Rittgers v. Rittgers, 56 Iowa, 218, 220.

⁶ Silvester v. Wilson, 2 T. R. 444; Plenty v. West, 5 Com. Bench, 201; Grothe's Appeal, 135 Pa. St. 585. 19 Atl. R. 1058, 26 W. N. C. 265; Eshleman's Estate, 43 Atl. R. 201, 44 W. N. C. 96.

⁷ Doe v. Homfray, 6 Adol. & Ellis, 206.

out of the income,¹ or to *lease property* and *collect and pay* over the rents of the same,² or to accumulate profits and income, or if he is merely to keep the property *in repair*, the use, or, in modern language, the trust, is an active one, and it will not be executed by the statute of uses.³ In other words, where any control is to be exercised or any duty is to be performed by the trustee, *however slight it may be*, or where the trustee is empowered to exercise a discretion in the management of the fund, either as regards its investment or the expenditure of the income, the trust is active.⁴ For, inasmuch as it will be impossible for the feoffee or trustee to perform the duties imposed upon him unless he is permitted to retain the legal estate in him, it will be conclusively presumed that the feoffor meant that he should hold it. Equity will not permit the legal title to be transferred to the beneficiary under the statute of uses, against the plain intention of the creator of the use or trust that he should have only an equitable interest. And as the statute of uses also provided that the *cestui que use*, as soon as the use was executed, should stand seized in the same "quality, manner, form and condition" as he had in the equitable interest, and as he had only the right to receive the net income, it is clear that the statute had no application to an active trust or use, for no person can be a trustee for himself. But all passive uses or trusts, where the feoffee to use, or, in modern language, the trustee, has no active duty to perform, are exe-

¹ *Croome v. Croome*, 61 Law T. 814; *Walker v. Whiting*, 23 Pick. (Mass.) 313.

² *Sears v. Russell*, 8 Gray (74 Mass., 1857), 89.

³ *Clark's Estate* (Conn., 1899), 39 Atl. R. 155; *Cutter v. Hardy*, 48 Cal. (1874), 563; *Bowman v. Long*, 26 Ga. 142, 146; *Schley v. Lyon*, 6 Ga. 530; *Carpenter v. Browning*, 98 Ill. (1881), 283; *Morton v. Barrett*, 22 Me. (1842), 257; *Pearce v. Savage*, 45 Me. (1858), 90; *Leonard v. Diamond*, 31 Md. 563; *Leonard v. Haworth* (Mass.), 51 N. E. R. 7; *Newhall v. Wheeler*, 7 Mass. 189; *Norton v. Leonard*, 12 Pick. (29 Mass.), 152, 158; *Wells v. Castle*, 3 Gray, 323; *Exeter v. Odiorne*, 1 N. H. 232; *Pullen v. Reinhard*, 1 Whart.

(Pa.) 514, 530; *Shankland's Appeal*, 47 Pa. St. 113; *Barnett's Appeal*, 46 Pa. St. 392, 398; *Lancaster v. Dolan*, 1 Rawle (Pa.), 231; *Watson's Appeal*, 125 Pa. St. 340; *Moorhead's Estate* (Pa.), 36 Atl. R. 647; *Aikin v. Smith*, 1 Sneed (Tenn.), 304; *Brooks v. Marbury*, 11 Wheat. 78; *Peter v. Beverly*, 10 Peters (U. S.), 532.

⁴ *Bennett v. Bennett*, 66 Ill. App. 28; *Kirkland v. Cox* (1880), 94 Ill. 412; *Kellogg v. Hale* (1883), 108 Ill. 168; *Doe v. Briggs*, 2 Taunt. 109; *Nevil v. Saunders*, 1 Vern. 415; 1 *Prest. Estates*, p. 185; *Ackland v. Lutley*, 9 Adol. & Ellis, 979; *Doe v. Field*, 2 B. & Al. 564; *Doe v. Passingham*, 6 Barn. & Cress. 305; *Doe v. Collier*, 11 East, 377.

cuted by the statute of uses in the *cestui que use*. The trustee takes no legal estate, but *that* coalescing with the equitable interest passes *at once* under the will to the beneficiary.¹

A devise to A. in fee in trust to convey the land to B. and his heirs absolutely, where the sole duty of the trustee is *to convey to the beneficiary*, is a passive trust which is executed in B. by the statute of uses upon the death of the testator, or when the conveyance is directed to be made.² But where the trustee is

¹ Bowman v. Long, 26 Ga. 142, 147; Carpenter v. Browning, 98 Ill. (1881), 282; Witham v. Brooner, 63 Ill. (1872), 344; Simonds v. Simonds, 112 Mass. (1873), 157; Everts v. Everts, 80 Mich. 222, 45 N. W. R. 88; Thompson v. Conant (Minn., 1896), 53 N. W. R. 1145; Pugh v. Hayes, 115 Mo. 424, 21 S. W. R. 23; Moorehouse v. Hutchinson, 2 N. Y. Supp. 215; Appeal of Rodrigue (Pa., 1895), 15 Atl. R. 680; Kay v. Scates, 37 Pa. St. (1860), 31; McCune v. Baker, 156 Pa. St. 508 (1893), 26 Atl. R. 658; Bacon's Appeal, 57 Pa. St. 504; Ioor v. Hodges, 1 Speer's Eq. (S. C., 1844), 593, 596; Robinson v. Ostendorff, 38 S. C. 66 (1892), 16 S. E. R. 371; Reeves v. Brayton, 15 S. E. R. 658, 36 S. C. 384; Georgia, etc. Co. v. Scott, 38 S. C. 34, 16 S. E. R. 185; Simms v. Buist (S. C., 1898), 30 S. E. R. 400; Riehl v. Bingenheimer, 26 Wis. (1870), 84; Martin v. Fort, 83 Fed. R. 19; Henson v. Wright, 85 Tenn. 501, 12 S. W. R. 1035. A devise to a trustee in fee, imposing no duties except to apply the proceeds and profits to the personal use of the beneficiary (a widow, and not in contemplation of marriage) as she might require them, and containing no limitation over, either as to the income or *corpus*, creates a passive trust, and the beneficiary is entitled to a conveyance of the estate. Appeal of Rodrigue (Pa., 1895), 15 Atl. R. 680. Testator devised land to his wife for life, remainder to be equally divided between his children, and directed her

to execute a conveyance of the shares of his two daughters to a trustee named, to take effect after her death, for their separate use, which was done. *Held*, that the trust was passive, and that the statute of uses vested in such daughters the legal title to their shares. Moorehouse v. Hutchinson, 2 N. Y. Supp. 215. "Perhaps the rule might be more accurately expressed to say that, when the intention is that the estate shall not be executed in the *cestui que trust*, and any object is to be effected by its remaining in the trustees, then it shall *not* be executed." By the court in Posey v. Cook, 1 Hill Eq. (S. C.), 413, 414. If land be devised to A. in trust for B. for his life, and on B.'s death in trust to convey to B.'s heirs, and the use is executed by the statute in B., he will by the operation of the rule in Shelley's case take an estate in fee simple and his heirs will take by descent from him. *Ante*, § 663. If the trust is not executed in B., the equitable interest in him and the legal interest in his heir will not coalesce and the heirs of B. will take as purchasers. Jones v. Lord Say and Seal, 8 Vin. Ab. 262, 1 Eq. Cas. Abr. 383, pl. 4; Biscoe v. Perkins, 1 Ves. & Bea. 485.

² Adams v. Guerard (1859), 29 Ga. 651; Watkins v. Reynolds, 123 N. Y. 211, 25 N. E. R. 322; Appeal of Bacon, 57 Pa. St. (1868), 36; Westcott v. Edmunds, 68 Pa. St. 36.

to pay the income to *A. during his life*, and upon *A.*'s death he is directed to convey the fee as *A.* shall appoint, or among *A.*'s issue, and if *A.* leaves no issue then to convey to *B.*, the trust is an active trust as regards the fee simple of the estate by reason of the duties which the trustee is to perform.¹ Thus a devise by the testator of his estate to *A.* for life, remainder to *A.*'s children, and the appointment of *B.* as trustee during *A.*'s life, with full power in said trustee to grant and convey the fee simple of the property, and on *A.*'s death to become executor of the estate, create an active trust though the trustee has absolutely nothing to do but to convey the fee when it shall become necessary to do so.²

Whether a devise to the use of *A.* to *permit him to receive rents and profits* is or is not a passive trust depends on the facts of the case. If the trustee has *any duty* to perform, however slight it may be, in connection with the receipt of the income by the beneficiary, the trust is active. In England a trust to preserve contingent remainders, and to *permit the beneficiary of the particular estate* to receive income by imposing an active duty upon the trustee, will prevent the execution of the trust by the statute.³ The same rule of construction was applied where the use was to permit *A.* to receive the *net* profits, as the word *net* implies the receipt of the *gross* income or profits by the trustee, and the payment and deduction by him of all charges for the management of the estate.⁴ But usually a devise in trust to *permit A.* to receive the income, the trustee *having no duty to perform*, as distinguished from a devise in trust to *receive and pay* the income, is a passive trust and hence it is executed by the statute.⁵

¹ *Green v. Grant*, 143 Ill. 61 (1892), 32 N. E. R. 369; *Meek v. Briggs*, 87 Iowa, 610 (1893), 54 N. W. R. 456. Cf. *Hale v. Hale*, 146 Ill. 227, 33 N. E. R. 858. A trust to divide lands as indicated by the will, and a *fortiori* to divide lands among several persons in the discretion of the trustee, and to convey the same to the beneficiaries, is an active trust.

² *Doe v. Roe* (Del., 1894), 40 Atl. R. 1106.

³ *Biscoe v. Perkins*, 1 Ves. & Bea. 485.

⁴ *Barker v. Greenwood*, 4 Mee. & Wel. 421.

⁵ Right dem. *Phillips v. Smith*, 12 East, 455; Doe dem. *Noble v. Bolton*, 11 Adol. & Ellis, 188; Doe dem. *Leicester v. Briggs*, 2 Taunton, 109; *Up- ham v. Varney*, 15 N. H. 462; *Ware v. Richardson*, 3 Md. 505, 548.

§ 774. Uses for the benefit of married women are not executed by the statute.—The statute of uses does not execute the use where land is devised to A. in trust for the benefit of B., who is a married woman, and A. is to hold it for her separate use,¹ though the trustee has no active duties to perform in connection with the trust estate. Thus, a trust *to permit* a married woman to receive the rents and profits for her separate use is not executed by the statute,² though the trustee has absolutely no duty whatever to perform in connection with the receipt of the profits by the woman. The purpose of the testator to confer an interest in real property upon the beneficiary which will be wholly free from the common-law incidents which attach to land which is owned by her during coverture would be defeated by the execution of the use and the vesting of the seizin and legal title in her.³ The husband has the right at common law, independently of statute, to receive the rents of the land owned by the wife during marriage, and upon the wife's death, having children by him, he may enforce his right of curtesy.⁴ If the property is thus placed in trust for the *femme covert* she may dispose of it by sale, mortgage or devise, free from the control of her husband, unless the testator or other person creating the trust in her favor has expressly limited her power of alienation.⁵

The fact that no use was held to be executed under the English statute of uses, where the *cestui que use* could not hold the legal title in such "quality, manner, form and condition" as he enjoyed the use, furnishes the reason why a separate use for a

¹ 2 Black. Com., p. 836.

² Harton v. Harton, 7 Term R. 652; Doe dem. Woodcock v. Barthrop, 5 Taunton, 582.

³ 2 Black., p. 433.

⁴ Steacey v. Rice, 27 Pa. St. (1856), 75, 81; Williman v. Holmes, 4 Rich. Eq. (S. C., 1851), 475, 495; Westcott v. Miller, 42 Wis. 465; In re Berg's Estate, 30 Atl. R. 1022, 166 Pa. St. 113. Cf. cases ante, § 753.

⁵ See ante, § 121, and see cases fully cited ante, § 754. A conveyance of land to a trustee to apply the yearly income, rents and profits to the grantor's use for life, free from the

control of her husband, being recognized as a valid express trust by 1 Revised Statutes of New York, page 728, section 55, subdivision 3, vests the whole legal and equitable estate in the trustee, subject only to the execution of the trust imposed (section 60), and every estate and interest not embraced in the trust, and not otherwise disposed of, by force of section 62, remains in and reverts to the grantor and her heirs as a legal estate. (Affirming 5 N. Y. S. 442, Andrews, J., dissenting.) Townshend v. Frommer, 26 N. E. R. 805, 125 N. Y. 416.

married woman is not executed. *Cessat ratio, cessat lex*. Where, by reason of the operation of the modern statutes in the states of the American Union, a married woman may now hold, enjoy and dispose of her real property in the same manner and to the same extent as though single, it would seem that a separate use trust for the benefit of a married woman would be executed by the statute.¹ But it must not be understood that even where, by some modern statute, a married woman enjoys all the rights of a *femme sole* as to her property, a trust for her benefit is *always* executed by the statute of uses. The fact that a beneficiary of a trust estate is a *femme coverte* does not *alone* execute a trust in her, provided it is an active trust which is otherwise valid under the statute of uses. Thus a trust in express terms to pay the income to A. *for her sole and separate use*, free from the control or interference of her husband, is a valid trust at the present day, not because A. is a married woman, but because it is an active trust, vesting the legal estate and seizin in the trustee, and it is for that reason not executed by the statute.²

¹ Sutton v. Aikin, 62 Ga. 753; Bayer v. Cockerill, 3 Kan. 292; Bratton v. Massey, 15 S. C. 277; Ware v. Richardson, 3 Md. 505, 548. The fact that the will declared that the land devised should not be liable for the debts of the daughter's husband did not render the intervention of trustees necessary, and thus take the case out of the statute of trusts, since, under the constitution of 1868, a woman's estate is not liable for her husband's debts. Robinson v. Ostendorff, 38 S. C. 66, 16 S. E. R. 371.

² Greenwood v. Coleman (1859), 34 Ala. 150; McDonald v. McCall, 18 S. E. R. 157, 91 Ga. 804; Sidway v. Nichols (Ark., 1897), 34 S. W. R. 529; Richardson v. Stodder, 100 Mass. 528; Roach v. Dabney (Ky.), 11 S. W. R. 661; In re Dorney's Estate (1890), 136 Pa. St. 142, 26 W. N. C. 445, 20 Atl. R. 645; Appeal of Edmunds (1871), 68 Pa. St. 24; Lewis v. Bryce, 187 Pa. St. 362, 41 Atl. R. 362; Waller's Adm'r v. Catlett's Ex'r, 83 Va. 200 (1887), 2

S. E. R. 280. A trustee, merely holding the legal title to property for the separate use of a married woman, cannot incumber it, without express or implied authority in the deed creating the trust. Seborn v. Beckwith (1896), 5 S. E. R. 450. The fact that at the present time, by statute, a married woman may alienate her property as though she were unmarried, does not enable the trustee of a coverture trust to sell the trust property for her support, though with her consent, where he has power under the will to sell for reinvestment only. To permit this would enlarge the powers of the trustee beyond the terms of the instrument creating the trust. Rabb v. Flenniken, 29 S. C. 278, 7 S. E. R. 597. A devise in trust for a wife and her children, so that her husband shall not control the same, confers no interest in the children during the life of the mother. Waller's Adm'r v. Catlett's Ex'r, 83 Va. 200, 2 S. E. R. 280. See also Mc-

Whether the married woman shall take the equitable title in fee or for her life only, and whether the trust, being especially created by the will for her separate use during her coverture, shall be executed in her as a legal estate *during the time she is not actually under coverture*, to revive as a trust upon her remarriage, are questions to be determined upon the language of each separate will. The purpose of a testator who creates an active trust for the benefit of a married woman "for her sole and separate use during coverture" is now usually to protect the wife from the influence and importunity of the husband. It is meant to prevent the wife from transferring the property to her husband as she might do if she was vested with the legal title. While a woman is unmarried a trust for her separate use, to be free from the control of her husband, though it is valid as an active trust, is unnecessary. Accordingly if, at the date of the death of the testator, the beneficiary is married, the trust, which is to endure during her coverture, will terminate upon the subsequent death of her husband, and she will then take absolutely. And though a devise in trust for a married woman "for her sole and separate use during coverture, excluding *all control of her husband*," gives her an equitable estate during coverture, her interest becomes a legal estate upon her husband's death, so that if, by the will, a remainder has been limited to the heirs of her body, the estate in her and in the remaindermen will be of the same quality, and an estate in fee will result to her by the rule in Shelley's case.¹ And, upon the other hand, if the woman is unmarried at the death of the testator, and *a fortiori* if she be then an infant of tender years, so that her marriage, if it shall take place at all, will occur only in the distant future, the use, though active, may be executed at once in her by the statute, where the sole intention of the testator was to give her property a protection which she does not then, and may never, need.² And it has also been held that a devise of an estate in trust for the

Donald v. McCall, 18 S. E. R. 157, 91 Ga. 304.

¹ Shalters v. Ladd (Pa.), 21 Atl. R. 596, 28 W. N. C. 86. See *ante*, §§ 655-665.

² Meacham v. Graham (Tenn., 1897), 39 S. W. R. 12; Neale's Appeal, 104

Pa. St. 214 (1883), 22 Atl. R. 444, 28 W. N. C. 557. Compare *In re Dorney*, 136 Pa. St. 142 (1890), 26 W. N. C. 445, 20 Atl. R. 645; Koenig's Appeal, 57 Pa. St. 352; Tucker's Appeal, 75 Pa. St. 354.

separate use of a woman during her marriage is void as a trust when she was neither married nor in contemplation of marriage at the date of the execution of the will, though she was married at the date of the death of the testator.¹

§ 775. A use upon a use is not executed by the statute.—The statute executes the use in that person only who is the immediate *cestui que trust* or *use*. Hence, if A. was enfeoffed in fee of land (he having livery of seizin) to the use of B. and *his* heirs, to the use of C. and *his* heirs, the statute would execute only the first use in B.² The seizin was drawn out of A. to B. and his heirs by the statute, but it went no further than B. The first use was executed in him, and this would have rendered the second use a nullity had it not been for a consideration arising out of the construction of another phrase which was found in the statute. B. and his heirs then had in them the seizin; but as they were, by the express terms of the statute, to stand seized of the land in “*such quality, manner, form and condition*” as they had before possessed in the use, B. and his heirs took the legal title and the seizin as trustees for C. and his heirs.³ So where the property was limited in a marriage settlement to A. for the use of B. for life, and after B.’s death in trust for the use of the settlor for his life, with various remainders over, it was held that the use was executed in the settlor for his life, and that the limitations over were not trust estates, but that they were contingent remainders at the common law.⁴

§ 776. The statute of uses in the United States.—The English statute of uses formed a part of the system of law which was introduced in America by the early English settlers. It is a general rule in determining whether an English statute is applicable to America, that in the absence of an express reenactment of the English statute, or of a precisely similar statute, such English statutes as are applicable to the situation and social condition of this country, and which were in force at the time of the settlement of America by the English, form a part of the common law of those states which were English

¹ In *re Quinn’s Estate*, 22 Atl. R. 965, 144 Pa. St. 444, 28 W. N. C. 557.

² 2 Black. Com., p. 336.

³ Dyer, 155; Cas. Temp. Tal. 164.

⁴ Carthew, 272; Tyrrell’s Case, Dyer, 155, 1 Co. R. 186b, 187; Croxall v. Sherrerd, 5 Wall. (U. S.) 268, 282.

territory at the date of the Revolution. In some of those states which were originally under the control of other governments than the English, the English statutes not repugnant to the constitution of the United States and not local in their character have been expressly re-enacted. It is probable, therefore, that at the present day the statute of uses forms a part of the law regulating land ownership in almost every state of the American Union where it has not been, expressly or by necessary implication, repealed.¹

§ 777. **Future and executory uses.**—At the common law no estate of freehold can be limited to commence *in futuro* without an intervening estate to support it.² The future estate was only valid as a common-law remainder if it were immediately preceded by an estate in freehold. If it were a contingent remainder it must vest either *during the continuance* of the prior estate, or *eo instanti* that that terminated.³ So, according to common-law rules, no estate in fee simple could be limited as a valid remainder after another precedent estate which was a fee simple.⁴ But when the courts of equity had established uses upon a firm foundation as valid dispositions of property, they permitted not only estates which would be valid at the common law to be created by means of feoffments to use, but very many other interests in land which were directly contrary in their character to all rules of the common law. Accordingly an estate in a freehold in the form and nature of a use might be devised to commence *in futuro* without any precedent estate to support it,⁵ and a use, called a shifting use, might be limited in fee to A., which, upon some future contingent event, would pass the fee in the use to another.

The future estate in the use, like a remainder, might be either vested or contingent. If the future use was vested, and if it

¹ Bryan v. Bradley, 16 Conn. (1844), 474; Bowman v. Long, 26 Ga. (1859), 142, 148; Booker v. Carlisle, 14 Bush (77 Ky., 1878), 154; McNab v. Young (1876), 81 Ill. 11; Milholland v. Whalen, 43 Atl. R. (Md., 1899), 43; Mathews v. Ward, 10 Gill & J. (Md., 1802), 443; Guest v. Farley (1853), 19 Mo. 147; Farmers' & M. Ins. Co. v. Jensen, 78 N. W. R. 1054; De Camp v. Dobbins, 29 N. J. Eq. 36, 43; Thomp-

son v. Gibson, 1 Ohio (1825), 439; Gorham v. Daniels (1851), 28 Vt. 600; Sherman v. Dodge, 28 Vt. 26, 31; Ayer v. Ritler, 29 S. C. 135, 7 S. E. R. 53; Croxall v. Sherrerd, 5 Wall. (U. S.) 268, 282.

² 2 Black. Com., p. 166; *post*, § 854.

³ 2 Black. Com., p. 168.

⁴ 2 Black. Com., p. 172 et seq.

⁵ See § 778.

was not embraced by any of the exceptions to the statute of uses elsewhere enumerated,¹ it was executed at once by the statute, although the actual possession and enjoyment of the land by the *cestui que use* were indefinitely postponed. If the future use was contingent it was not executed by the statute until it became vested either by the happening of the event upon which its vesting depended, or on the coming into being of the *cestui que use*. Where property is disposed of by will to *future uses*, some of which are vested and others contingent, the former are executed at once upon the death of the testator, while the contingent future uses are executed, if at all, only when they become vested upon the happening of the future contingency. Where the vested uses which were executed by the statute of uses exhausted the fee-simple seizin which was in the feoffee to use, so that the *cestui que use* of these vested though future uses became, by the statute, seized in fee simple of the whole legal estate, an apparently difficult question arose as to the existence of any seizin sufficient to support the contingent uses, which had not been executed. For an example of this we may instance the very common case in England of a feoffment to A. and his heirs for the use of B. for B.'s life, which is vested, remainder to the use of B.'s unborn sons in tail (which is a contingent use), remainder in fee to C., which is again a vested use. The statute executes the uses in B. and C., giving B. a life estate at law and C. the fee simple in remainder. The inquiry then is whether any one is still seized as feoffee to the use of B.'s unborn sons, or whether that contingent use has been destroyed or absorbed. By the execution of the uses in B. and in C. the whole legal estate and seizin were apparently drawn out of A. and his heirs and exhausted. But the statute did not execute the contingent use for B.'s sons *until they were born*, when the use vested in them. The inclination of the common-law judges was against the validity of such contingent uses, and, so far as possible, they were assimilated to and treated as contingent remainders.² The courts determined in the time of Lord Coke that, despite the execution of the vested uses by the statute, by which apparently all the seizin was drawn out of the feoffee, a certain interest denominated a *scintilla juris* still remained in him, which would serve to fur-

¹ *Ante*, § 775.

² See *ante*, p. 1104.

nish a seizin as a support for the contingent use, and which would also enable the feoffee to use to defeat the use by alienation in the same way that a contingent remainder might be defeated by a feoffment, release or forfeiture made by the particular tenant before the contingent estate vested.¹

It was absolutely indispensable that some one should remain enfeoffed or seized of the fee to support the contingent use. And while the majority of the judges indulged in the fiction of a *scintilla juris* in the feoffee, though by the statutory execution of the vested uses all the seizin had apparently been drawn out of him, others permitted their subtle imaginations to run riot, and assumed the existence of a seizin "*in nubibus, in mare, in terra, in custodia legis.*" It matters not which explanation is adopted, we are equally under the necessity of believing in the existence of something, which, if we are consistent and logical, we must see has no existence whatever. We may repudiate the technical reasoning and subtlety with which the early judges have surrounded the whole subject of contingent uses, and adopt the modern view, commended alike by reason and good sense, that the vested estate which B. and C. take in the example above given is vested in them, not absolutely, but *subject* to the contingent use estate. No interest of any sort whatever remains in the original feoffee to use. But no estate in the contingent use arises until the happening of the contingent event or the birth of the contingent *cestui que use*, and then the vested estates, which are vested *sub modo* only in B. and C., *open and let in the contingent use* which has become vested. No *scintilla juris*, or any other estate, remains in A., but the contingent uses, *when* they arise and become vested estates, take effect *ex relatione* out of the original seizin. Consequently the contingent uses are not defeasible by the feoffee, as is a contingent remainder² by the feoffment or forfeiture of the particular tenant.

§ 778. **Shifting, springing and contingent uses.**—The operation of the statute of uses in executing the use is delayed, as regards all future uses which are not vested, until the happen-

¹ Brent's Case, Dyer, 340a; Chudleigh's Case, 1. Rep. 120; 4 Kent, pp. 230-240. 184; 1 Sugden on Powers, pp. 20-48; 2 Washburn on R. P., p. 420; 4 Kent, Com., p. 239; *post*, §§ 854, 855.

² Preston on Estates, vol. I, pp. 164-

ing of the contingent event upon which the future use will vest.¹ This event must not be too remote, for a perpetuity cannot be created by a limitation of a use.

Future uses may be divided into springing, shifting and contingent uses. Springing uses are such as are to arise upon the happening of some future event, but where no preceding use is created. These springing uses do not take effect in derogation of any other interest, except, in case the use is created by will, it be an estate in the heirs of the testator, who would have a resulting use. Thus, a future use limited to A. and his heirs on the death of B., who is alive at the death of the testator, or a use which is to commence on the happening of any other future event, is a springing use. A springing use may be either vested or contingent. In the example given, if A. is a living person at the death of the testator, the use is vested. But if a use is limited to the heirs of B. after a life estate in A., and B. is alive, the use is contingent until the death of B., for, until that event takes place, it cannot be known who will be his heirs.²

Shifting or secondary uses are such as take effect either in defeasance or in derogation of some prior use, and they are always contingent. They must, of course, vest an estate within the period permitted by the rules against perpetuities.³ They may be limited either by the instrument creating the prior estate which they defeat, or they may be created by the execution of a power of appointment conferred by the same instrument.

A shifting use may be limited to arise after the determination of a prior estate in fee, and in defeasance of it, if the vesting of the fee is not too remote. By means of a shifting use the fee could be made to pass from one person to another successively. Such an estate was called a conditional limitation, and, as it always followed a fee simple and defeated it, was not valid at the common law as a remainder, though it was sustained when in the form of a future use or trust, or later as an executory devise under the statute of wills. But a future use may be limited to vest after a fee tail at any future period,

¹ *Ante*, § 777.

pp. 600-613; 2 Cruise, Digest, 263; 4

² Washburn on Real Property, Kent, Com., p. 291. Cf. § 857.

³ 2 Black. Com., p. 334; *post*, § 882.

and no perpetuity is thereby created, because the tenant in tail always has the power to convey the fee tail by a common recovery, and to thus destroy the shifting use or any contingent remainder which may follow his estate.¹

A third species of future use is called a contingent use, which is where a use is limited, somewhat like a contingent remainder at common law, as to the children of A. who may be alive at his death after a life estate in A. To such uses the rule applicable to contingent remainders is applied, and they are defeated by the destruction of the particular estate,² or by the fact that the prior estate is not sufficient to support them, as where it is not an estate of freehold. And the general rule is that if a future estate can be construed to be a contingent remainder, it will go into effect as such, and not as a shifting or springing use under the statute of uses.

Shifting and springing uses are in their character somewhat similar to executory devises. But uses differ from executory devises in that they are usually created by deed, and more particularly because they require that there shall be a person seized to the use at the time the contingency happens and future use vests, for otherwise the use cannot be executed by the statute. If, therefore, the estate of the feoffee is destroyed prior to the vesting of the future use, the use is also destroyed, because it cannot be executed. But as an executory devise is a conveyance not operating by a transmutation of possession, *i. e.*, by livery of seizin, but wholly under the statute of wills, the freehold can be transferred to the executory devisee at once when the future date arrives.³ And in both cases a fee may be limited to take effect after a fee.

§ 779. **The law of modern trusts.**—A use prior to the statute was a mere confidence reposed by one person in another creating a moral obligation which was enforced only by a court of equity acting upon the conscience of the feoffee to use, though to all other intents and purposes the feoffee had an absolute and legal ownership. The terms "*use, trust and confidence*" are in the statute of uses, and had the statute in fact abolished uses, as it was intended that it should, no line of distinction between an ancient use and a modern trust would have

¹ 4 Black. Com., p. 429.

² 2 Black. Com., pp. 333, 334.

³ 2 Black. Com., p. 334. See also *post*, §§ 874, 875.

been necessary.¹ After the effective operation of the statute of uses had been nullified by the many exceptions which were made to it, a comprehensive system of new property interests, which were cognizable only in equity, was created and regulated under the appellation of trusts. *A trust is a use which is not executed by the statute*, while all interests of an equitable character which are converted into legal estates by the operation of the statute of uses may be called uses to distinguish them from those which are not thus executed. A trust is what a use was before the statute. A trust in land is an interest in the land wholly distinct from the legal estate. In so far as the statute of uses has not been repealed in America, no difference exists between the ancient use and the modern trust in principle, though a great difference exists in the application of the principle and in the rules by which the interest of the *cestui que use* or trust is protected. For modern trust estates are largely subject to common-law rules. They descend in the same lines as legal estates, and where their alienation is not limited by the terms of the instrument by which they are created, they may be devised, assigned and otherwise disposed of to the same extent as legal estates.² The disposition made by the beneficiary will be binding upon the trustee. But though equity will thus follow the law, it does not always adhere closely to technical legal rules, particularly in the case of testamentary trusts, when to do so would often overcome the intention of the testator. Thus a beneficiary to whom the testamentary trustee is to pay income alone during his life has no legal interest whatever in the *corpus* which is alienable, though he may, in the absence of any prohibition in the will, assign his share of the income, and the trustee must pay to his assignee.³ But when the trust, having ceased to be active, is executed by the statute, and the legal title to the *corpus* vests in the *cestui que trust*, he becomes capable of giving a valid conveyance of the estate, and a court of equity will decree that the trustee shall convey the legal estate as he shall direct.⁴

§ 780. Statutes regulating trusts in the United States.— In the states of New York,⁵ California,⁶ Michigan, Minnesota

¹ 4 Kent, p. 284; 1 Spence, Eq. Juris., pp. 491, 493, 494.

² *Ante*, § 754.

³ *In re Neil*, 62 Law Times, 649.

⁴ Lewin on Trusts, p. 470; Perry on Trusts, § 371.

⁵ 4 R. S. (8th ed.), p. 2457, § 55.

⁶ Code, §§ 847, 857, 867, 869.

and Wisconsin, the statute of uses has been repealed, and particular classes of trusts have been declared by statute to be valid to the exclusion of all other trusts. Passive trusts are abolished by these statutes and the legal and equitable interests are merged in the beneficiary.¹ And all trusts which cannot be classified under any one of the four heads which are enumerated below are invalid, though they are active trusts, and the legal and equitable estates are at once united in the person who is named as the beneficiary of the trust. Valid express trusts are thus classified by these statutes: 1. Trusts to sell lands for the benefit of creditors. 2. Trusts to sell, mortgage or lease lands for the benefit of legatees, or to pay charges thereon. 3. Trusts to receive the rents and profits of land, and to apply them to the use of any person for life, or for a period the length of which is not obnoxious to the rule against perpetuities. 4. To receive the rents and profits of land and to accumulate them during the minorities of minors in being. In any case which in terms comes within one of the classes before mentioned, the whole legal estate is vested at once by the will in the trustees for the purposes of the trust. The trustee has the right to the possession, and he is to all intents and purposes the legal owner, though the extent of his powers over the property depends upon the express language of the will.²

Under these statutes the *cestui que trust* acquires no estate in the land at law. A beneficiary cannot sue the trustee at law for his share, where the amount thereof has not been determined, nor the accounts of the trustee settled.³ He has merely a right to the receipt of the income of the property in trust, which he may enforce in equity by a proceeding to compel the trustee to act and to account, or by a bill to secure his removal and the appointment of another trustee in his place. Whether the trustee of a trust which is valid under these statutes shall

¹ *Townsend v. Frommer*, 125 N. Y. 446; *Wright v. Douglas*, 7 N. Y. 564; *Braker v. Devereaux*, 8 Paige (N. Y.), 513, 518; *Johnson v. Fleet*, 14 Wend. (N. Y.) 176, 180; *Greene v. Greene*, 125 N. Y. 506. See also § 773. *McDevitt* (1878), 72 N. Y. 556; *Ramsay v. De Remer*, 20 N. Y. S. 143, 65 Hun, 212; *Gifford v. Rising* (1889), 51 Hun, 1; *Buchanan v. Little*, 154 N. Y. 147, 47 N. E. R. 979.

² *Henderson v. Henderson*, 113 N. Y. 1 (1889), 20 N. E. R. 814; *Garvey v.* ³ *Judgment* (1896) 89 N. Y. S. 971, 7 App. Div. 66, affirmed. *Husted v. Thompson* (N. Y., 1899), 53 N. E. R. 20.

have the power of conveying the fee by sale or mortgage depends altogether upon the language of the will and the nature of the estate.¹ Where the power of sale is not expressly given it will not ordinarily be implied, unless the carrying out of the testator's intentions imperatively requires a sale.²

§ 781. Language by which a trust may be created — The duration of the estate taken by the trustee.— No particular form of words is necessary to be employed in order to create a trust. The testator need not employ the word "trust" in his will. If he has named a person in that instrument and has directed him to carry out all or a portion of the provisions which have been made for others therein, and the person thus named cannot execute such provisions of the will, except the legal title to the property shall be vested in him as a trustee, then that person will be a trustee by implication, though there may have been no direct devise of the legal title to him and the word "trustee" or "trust" was not used. And, on the other hand, though property may have been apparently given to a person named, absolutely for his own, he will be by implication held to take it as a trustee, where the provisions of the will imperatively require that a trust shall be created in him. He will take as a trustee where it will be impossible to carry them out otherwise. In all such cases the existence of an intention on the part of the testator to create a trust, though not expressly stated, is said to be inferred from the whole will. But the question whether a valid trust has been created, either expressly or by inference, is quite distinct from the determination of the quantity of the estate which is conferred upon the trustee.

The question whether one who is named as a trustee takes *any estate* is always to be answered by applying the terms of the statute of uses, or of the local statute authorizing the creation of trusts. If the trust is *active and is one permitted by the statute*, the question as to the quantity of the interest, *i. e.*, as to the nature and the duration of the estate which the trustee is to take, is one of intention which is to be ascertained from a construction of the language of the will. An estate of inheritance in a trust has always been capable of being created without the insertion of technical words of inheritance or of suc-

¹ *Post*, §§ 783, 784.

² *Ante*, § 699.

cession.¹ If the *purposes of the trust require that the trustee shall take the fee simple* of the legal interest in order that those purposes may be carried out, he will take an estate of inheritance, though no words of inheritance have been used by the testator in devising the legal interest. Hence, if the interest given to the beneficiary, though it was devised to him in indeterminate language, is greater than the legal interest devised to the trustee, the trust estate will be enlarged in the trustee to answer all the purposes of the trust. If the carrying out of the purposes of the trust require that the trustee shall take a fee, equity will create a fee simple in him by implication without the use of the word "heirs."² Though the interest in the beneficiaries *be expressly for life*, the estate of the trustee may be a fee simple, if the powers conferred upon him by the will require that he shall take a fee for their full and proper exercise.³ But where the legal estate in the trustee is in express terms for the life of the trustee only, it will not be enlarged to a fee simple by the fact *alone* that the estate in the beneficiaries is a fee simple. In such case, while a court of equity has no power to disregard the intention of the testator by creating a fee where he has given only a life interest, it may appoint a new trustee to execute the trust in the place of the trustee who has died.

¹ *Ante*, § 684.

² Chase v. Cartwright, 53 Ark. 358, 14 S. W. R. 90; Le Breton v. Cook, 107 Cal. 410, 40 Pac. R. 522; Korn v. Cutler, 26 Conn. 358; Deering v. Adams, 37 Me. 264, 273; Lunt v. Lunt, 108 Ill. (1884), 307; Steib v. Whitehead, 111 Ill. 247 (1884); Green v. Grant, 143 Ill. 61, 32 N. E. R. 369; Devries v. Hiss, 72 Md. 560 (1890), 20 Atl. R. 131; Farquharson v. Eichelberger, 15 Md. 73; Cleveland v. Hallett, 6 Cush. (Mass.) 403, 406; Esterbrooke v. Tillinghast, 5 Gray (Mass.), 21; Mayhew v. Godfrey, 103 Mass. 290, 292; Stanley v. Colt, 5 Wall. (U. S.) 168; Holt v. Holt, 114 N. C. 241, 18 S. E. R. 967; Gould v. Lamb, 11 Met. (Mass.) 87; Greenough v. Wells, 10 Cush. (Mass.) 571, 577; King v. Parker, 9 Cush. (Mass.) 77, 81; Newhall v.

Wheeler, 7 Mass. 189, 198; Angell v. Rosenbury, 12 Mich. 266; Stearns v. Palmer, 10 Met. (Mass.) 32, 35; Boston Safe Deposit Co. v. Mixter, 146 Mass. 100, 15 N. E. R. 141; Traphagen v. Levy, 45 N. J. Eq. 448, 453; Cumberland v. Graves, 9 Barb. (N. Y.) 595; Welch v. Allen, 21 Wend. (N. Y.) 147; Fisher v. Field, 10 Johns. (N. Y.) 505; Carney v. Kain, 40 W. Va. 650, 23 S. E. R. 753; Brown v. McCall, 44 S. C. 503. Compare *ante*, § 684.

³ De Haven v. Sherman, 131 Ill. 115, 22 N. E. R. 711. *E. g.*, where the trustee is to pay income to A. for his life, with a power to sell the land and to pay the proceeds to A. or his heirs absolutely. Blount v. Walker, 31 S. C. 13, 9 S. E. R. 804; Rickett's Appeal (Pa.), 12 Atl. R. 60.

And if an estate in *fee simple* is expressly given to the trustee, and the purposes of the trust do not require such an estate in him, a resulting trust will ensue for the benefit of the heirs of the testator, or for the residuary devisee, in that portion of the beneficial interest which cannot be applied to the original purposes of the trust.¹

In the absence of statute a devise to a trustee without words of inheritance, where the trust does not require a larger estate, may create a life estate only in the trustee.² But a statute which enacts that every devise of land shall be considered as a devise of the fee, unless that construction shall be inconsistent with the intention, is applicable to a devise to a trustee. The trustee takes the fee, but he holds it only for such period as the trust estate lasts, and on the termination of the trust the legal and equitable titles to the fee are merged.³ But in most cases it is held, even where a statute of this sort exists, that where no express estate is, in terms, devised to the trustee, and the purposes of the trust will be completely performed during his life, or during the life or lives of the beneficiaries, the trustee will only take an estate for his life or the life or lives of the beneficiaries. And, upon the termination of the trust, the legal and equitable interests are merged by the statute of uses in that person who, under the will, has the next succeeding estate.⁴ So, even when an estate is *expressly lim-*

¹ *Ante*, § 473.

² In *re* Hudson, 13 Reports, 546; Baker v. McAden, 118 N. C. 740, 24 S. E. R. 531.

³ Haynesworth v. Goodwin, 35 S. C. 54, 14 S. E. R. 491.

⁴ Powell v. Glenn (1852), 21 Ala. 458; Beers v. Narramore, 61 Conn. 13 (1891), 22 Atl. R. 1061; Smith v. Dunwoody (1856), 19 Ga. 238; Bagley v. Kennedy, 81 Ga. 721 (1888), 8 S. E. R. 742, 81 Ga. 359, 8 S. E. R. 737; Baxter v. Wolff, 20 S. E. R. 325, 93 Ga. 334; West v. Fitz (1884), 109 Ill. 425; Walton v. Follansbee, 131 Ill. 147 (1889), 23 N. E. R. 832; Hobie v. Ogden, 72 Ill. App. 242; Jackson v. Thompson, 24 Atl. R. 459, 84 Me. 84; Morse v. Morell, 82 Me. 80 (1889), 19 Atl. R. 97; Felgner v. Hooper, 80 Md.

262; Mayhew v. Godfrey, 103 Mass. 290, 291; Abell v. Abell, 75 Md. 44 (1892), 23 Atl. R. 71; Whall v. Converse, 146 Mass. 345 (1888), 15 N. E. R. 660; Perkins v. Stearns, 163 Mass. 247 (1895), 39 N. E. R. 1016; In *re* Chapin, 148 Mass. 588, 20 N. E. R. 195; Coulter v. Robertson (1852), 24 Miss. 278; Pugh v. Hays, 115 Mo. 424, 21 S. W. R. 23; Hoffman v. Van Syckel, 44 N. J. Eq. 359, 14 Atl. R. 476; Roarty v. Smith, 53 N. J. Eq. 253, 31 Atl. R. 1031; In *re* Smith, 131 N. Y. 239, 30 N. E. R. 130; Roe v. Vingut, 117 N. Y. 204, 22 N. E. R. 933; In *re* Marshall's Estate, 147 Pa. St. 77, 23 Atl. R. 391; Sharp's Estate, 155 Pa. St. 289; Payne v. Sale, 2 Dev. & Bat. (N. C.) Eq. 455; Snelling v. Lamar, 32 S. C. 259, 10 S. E. R. 825;

ited to a trustee in fee, if the purpose of the trust is fulfilled or ceases during the life of a *cestui que trust*, and the legal title is devised to another, the estate of the trustee is cut down to an estate for the life of the beneficiary.¹

Thus where land is devised in fee in trust in express terms (and the same rule would of course apply in those states where an estate in fee may be created without the word "heirs"), and the beneficial interest is disposed of for the life of the beneficiary only, with a devise of the remainder absolutely in fee to others, the statute, immediately on the termination of the life interest, executes the trust in the remaindermen.² It follows logically from this that the default of a trustee who is to hold only during the life of the testator's widow in not bringing an action against one who claims the fee by prescription, or any action or neglect of his in regard to the fee, does not prejudice the remaindermen whom the trustee does not represent.³

Blount v. Walker, 31 S. C. 13; Covar v. Cantelon, 25 S. C. 35; Smith v. Metcalf, 1 Head (38 Tenn., 1858), 64; Ellis v. Fisher, 3 Sneed (33 Tenn., 1854), 331.

¹ Walton v. Follansbee, 131 Ill. 147; Liptrott v. Holmes, 1 Ga. 381; Morton v. Barrett, 22 Me. 257; Abell v. Abell, 75 Md. 44, 23 Atl. R. 71; Whall v. Converse, 146 Mass. 335 (1888), 15 N. E. R. 660; Mayhew v. Godfrey, 103 Mass. 290, 292; Cleveland v. Hallett, 6 Cush. (Mass.) 404, 407; Pearce v. Savage, 45 Me. 90; Roarty v. Smith, 53 N. J. Eq. 253, 31 Atl. R. 1031; In re Smith, 131 N. Y. 239, 30 N. E. R. 130; Norton v. Norton, 2 Sandf. (N. Y.), 296; Ward v. Amory, 1 Curtis, C. C. 419; Doe v. Davis, 1 Q. B. 438; Doe v. Barthop, 5 Taunt. 382; Baker v. Greenwood, 4 Meeson & Welsby, 421; Doe v. Timins, 1 B. & Alder. 547; Doe v. Ewart, 7 Ad. & El. 636.

² Adams v. Adams, 6 Q. B. 860, 9 Jur. 300; Healey v. Alston, 25 Miss. 190, and cases cited in note 4, p. 1113.

³ Bagley v. Kennedy, 81 Ga. 721, 8 S. E. R. 742. A trust for a married

woman and her husband, for their *joint lives*, and if *she* should survive, then to her and her children for her life or widowhood, but on her death or remarriage to be equally divided among the children and the issue of those deceased, terminates on the death of the husband. The wife and the *then* living children take a legal estate in fee, and *their* deed, with livery of seizin, will defeat the contingent remainder to the issue of one of the children. Snelling v. Lamar, 32 S. C. 259, 10 S. E. R. 825. Where the testator has created a trust to last for a specified period, at the termination of which the land held in trust is to be sold and divided, the trust cannot be terminated before the expiration of the trust period by the fact that a portion of the land in trust, in which the testator was a tenant in common, has been sold under an order of the court in an action for a partition. The proceeds of the sale must be held on the trust declared in the will. In re Chapin, 148 Mass. 588, 20 N. E. R. 195.

§ 782. **Trusts to sell land — When naked power of sale only is created.**— The question of the existence of a power of alienating the property, real or personal, which is the subject-matter of the trust, is to be answered solely and always from the terms of its creation. The rule as regards alienation is different in the case of a passive and in the case of an active trust. In the case of a passive trust, which is executed at once by the statute of uses, the legal and the equitable interests are merged thereby in the beneficiary, the trust is forever extinguished, and a conveyance by the trustee of the legal interest is not necessary, except perhaps as a matter of excessive caution. A conveyance by the trustee is always necessary to be executed where the trust is active. And in the case of all active trusts, in the absence of an express or implied prohibition against alienation, it is very probable that a deed of conveyance, executed by the trustee and the beneficiary or beneficiaries of the trust, would be sufficient to pass the title according to the terms of the trust. The legal and equitable interests would be merged by their union in the person to whom the deed of conveyance had been given. And of course it is always possible for the testator to confer an express or implied power of selling the legal estate upon a trustee, which shall be binding upon the *cestui que trust*, provided it shall be exercised by the trustee in good faith. In that case the beneficiary need not join in the execution of the deed of conveyance unless his assent is required by the terms of the will creating the power of sale.

A devise of land *in trust to sell* and to dispose of the proceeds according to the directions of the will is an active trust which is not executed by the statute of uses. The difficulty is to determine whether a trust estate is created giving the trustee an actual estate *in the land*, or whether he has merely a *naked power of sale*. Either may be created without the employment of technical words of inheritance.¹ The intention of the testator is to be ascertained from the terms which he has used. If he devise land expressly to the trustee or to his executor, as to A. "*in trust to sell*," it may be assumed that he meant to give him a legal estate in the fee, which will enable him to sell and to deliver possession. The trustee may then, until the execution of the power of sale by him, control the property as a

¹ *Ante*, § 781, p. 1111.

trustee and collect and expend the rents and profits for trust purposes. And, though there be no language of express devise to the trustee, if he is directed to take possession of the land, or if duties are imposed upon him which require an estate in him for their proper performance, he will take an estate in the land itself and not a mere power of sale. Where the trustee has the legal title in the land, and the power of sale conferred on him in connection therewith is mandatory, he may convey the fee absolutely without the consent of the beneficiary.¹

A mere direction to an executor or trustee to sell land, though the estate is not otherwise disposed of, does not give him an estate. All that he has is a naked power, without the right to the possession or the right to collect or disburse the rents and profits. The land descends to the testator's heirs subject to the execution of the power of sale.² The estate of the heirs

¹ *Hairston v. Dobbs*, 90 Ala. 589, 8 S. R. 147; *Scholl v. Olmstead*, 84 Ga. 693, 11 S. E. R. 541; *Beers v. Narramore*, 61 Conn. 13, 22 Atl. R. 1061; *De Vaughan v. M'Leroy*, 82 Ga. 687; *Clary v. Fraser*, 8 Gill & J. (Md.) 403; *Gray v. Lynch*, 8 Gill, 403; *Seeger v. Leakin*, 76 Md. 500, 25 Atl. R. 862; *Carter v. Van Bokkelen*, 20 Atl. R. 781, 73 Md. 175; *Greenough v. Wells*, 10 Cush. (Mass.) 571; *Gibbs v. Marsh*, 2 Met. (Mass.) 243; *Allen v. Dean*, 148 Mass. 594, 20 N. E. R. 314; *Brearily v. Brearily*, 9 N. J. Eq. 21; *Lindsley v. O'Reilly*, 50 N. J. Eq. 636, 15 Atl. R. 379; *Toronto G. T. Co. v. C., B. & Q. Co.*, 123 N. Y. 37, 25 N. E. R. 198; *Jackson v. Ferris*, 15 Johns. 246; *Ames v. Ames*, 15 R. L. 12; *Nelson v. Carrington*, 4 Munf. (Va.) 332; *Webster v. Thorndike*, 11 Wash. 390, 39 Pac. R. 677; *Gart v. Baldwin*, 2 Ves. 646; *Doe d. Booth v. Field*, 2 Barn. & Adol. 564.

² *Rubottom v. Morrow*, 24 Ind. 202, 204; *Todd v. Wortman*, 45 N. J. Eq. 723, 18 Atl. R. 843. A provision giving the real and personal property to the executor, in trust to invest at interest, impliedly authorizes the ex-

ecutor to sell the real estate. *Davenport v. Kirkland*, 40 N. E. R. 304, 156 Ill. 169; *Whittemore v. Russell*, 80 Me. 297, 14 Atl. R. 197; *Pratt v. Rice*, 7 Cush. (Mass.) 209, 212; *Braman v. Stiles*, 2 Pick. (Mass.) 460, 464; *Greenough v. Wells*, 10 Cush. (Mass.) 571, 577; *Perrin v. Lepper*, 72 Mich. 454, 40 N. W. R. 859; *Chasy v. Gowdry*, 43 N. J. Eq. 95, 9 Atl. R. 580; *Harris v. Strodl*, 132 N. Y. 392, 30 N. E. R. 962; *Henderson v. Henderson*, 113 N. Y. 1, 11, 20 N. E. R. 814; *King v. Ferguson*, 2 Nott & McCord (S. C.), 588; *Reeves v. Brayton*, 36 S. C. 384, 397, 15 S. E. R. 658. Where a testator directs his executor to sell his lands as soon as convenient, but makes no disposition of them until they are sold, the lands descend to his heirs, who are entitled to the rents and profits of them until the sale is made. *Todd v. Wortman*, 45 N. J. Eq. 723, 18 Atl. R. 843. A charge of the legacies upon the land of the testator which is devised in a residuary clause, with a direction that the executors may sell any part of the estate not specifically devised at any time they shall deem it convenient, empowers

while alienable, pending the execution of the power of sale, is taken by their alienee subject to the power, and the title of the subsequent purchaser under the power is paramount to that of the purchaser from the heirs.¹ And where the testator, after directing his executor or a trustee to sell his land, devises it to others, the former takes no estate or interest in the land, but a naked power of sale solely for the purposes of the will, and the devisees take title to the land with the right of receiving the rents and profits and all other incidents of possession, but subject to the power of sale.²

the executors to sell the land for payment of legacies at any time. *Seeger v. Leakin*, 76 Md. 500.

¹ *Morse v. Bank*, 47 N. J. Eq. 279, 20 Atl. R. 961; *Perkins v. Presnell*, 99 N. C. 222, 6 S. E. R. 801; *Spruance v. Darlington* (Del. Ch., 1898), 30 Atl. R. 663; *Wolfe v. Loeb*, 13 S. R. 744, 98 Ala. 426.

² *Patton v. Crow*, 26 Ala. (1855), 426; *Edwards v. Bender* (Ala., 1899), 25 S. R. 1010; *Clinefelter v. Ayers*, 16 Ill. (1855), 329; *Thompson v. Schenck*, 16 Ind. 194; *Warfield v. English* (Ky., 1889), 11 S. W. R. 662; *Bayard v. Rowan*, 1 A. K. Marsh. 9 (Ky., 1819), 214; *Morton v. Southgate*, 28 Me. 41; *Inman v. Jackson*, 4 Me. 237; *Mayo v. Merritt*, 107 Mass. 505, 506; *Fay v. Fay*, 1 Cush. (Mass.) 93; *Homer v. Shelton*, 5 Met. (Mass.) 462, 465; *Pettengell v. Boynton*, 139 Mass. 244; *Perrin v. Lepper*, 72 Mich. 454, 40 N. W. R. 859; *Battelle v. Parks*, 2 Mich. (1853), 531, 534; *Stokes v. Stokes*, 66 Miss. 456, 6 S. R. 155; *Snowhill v. Snowhill*, 23 N. J. L. 447; *Narr v. Narr*, 41 N. J. Eq. 448; *Chasy v. Gowdry*, 43 N. J. Eq. 95; *Killam v. Allen*, 52 Barb. (N. Y.) 605; *Jackson v. Schaubert*, 7 Cow. (N. Y.) 187, 194; *Bergen v. Bennett*, 1 Caines' Cas. (N. Y.) 16; *Cusack v. Tweedy*, 126 N. Y. 81, 26 N. E. R. 1033; *Harris v. Strodl*, 132 N. Y. 392, 30 N. E. R. 962; *Forster v. Winfield*, 142 N. Y. 327, 37 N. E. R. 11; *Clift v. Moses*, 116 N. Y. 141, 22 N. E. R. 393; *Mut. L. I. Co. v. Ship-*

man, 108 N. Y. 19; *Perkins v. Presnell*, 100 N. C. 220; *Haskell v. House*, 3 Brew. (S. C.) 242; *Ferebee v. Proctor*, 2 Dev. & Bat. (N. C.) 439; *Grosvenor v. Bowen*, 15 R. L. 549, 10 Atl. R. 589; *Anderson v. Butler*, 31 S. C. 183, 9 S. E. R. 797; *Atkinson v. Dowling*, 12 S. E. R. 93, 33 S. C. 414; *Hornsby v. Davis* (Tenn., 1896), 36 S. W. R. 159; *Beadle v. Beadle*, 40 Fed. R. 315; *Doe v. Shotter*, 8 Adol. & Ellis, 905; *Queen v. Wilson*, 3 B. & S. 201. "The law is too well settled for controversy that real estate, unless otherwise disposed of, goes to the heirs and not to the executor, and that a mere power given to the executor to sell real estate does not give him a right to the possession of the land; that to entitle him to the possession the land or its usufruct must be expressly, or by necessary implication, given to him by the will." By the court, in *Rubottom v. Morrow*, 24 Ind. 202, 204. A mere naked power of sale given to executors to be executed if the property cannot be satisfactorily divided is totally extinguished where the beneficiaries agree to divide without a sale. *Chasy v. Gowdry*, 43 N. J. Eq. 95, 9 Atl. R. 580. The New York statute (1 R. S. 729, § 561) providing that "a devise of lands to executors or other trustees, to be sold or mortgaged, where the trustees are not also empowered to receive the rents and profits, shall vest no title in the trustee, but the trust shall

§ 783. **The power of an executor to sell lands.**—An executor has no power to sell land unless the power of sale is conferred upon him by express language or by necessary implication. If the testator has imposed duties upon his executor which require, in order that they shall be properly executed, that the executor shall sell the land, he will take a power of sale by implication.¹ Thus, where the testator directs that a devisee's share *in land* shall be *paid* to him by the executor;² or where the testator directs that land shall be *distributed equally*, and it is incapable of exact partition;³ or that land shall be *invested and used*⁴ by the executor, he will have, by necessary implication, a power of sale over that land. So, also, where a sale of land is expressly directed, but no one is appointed in the will to sell it, the executor will have a power of sale by implication;⁵ but a direction to "*pay*" a trust fund and estate to the children of persons who, under the will, are to receive the income for their lives, does not *always* create a power of sale by implication. The fact that a considerable portion of the trust property is personal may strengthen the presumption that no power of sale over the land comprised in the fund was to be conferred upon the executors by a direction to "*pay*" trust property. And if the land is susceptible of a fair and

be valid as a power, and the lands shall descend to the heirs, or pass to the devisees of the testator, subject to the execution of the power." Construed in *Clift v. Moses*, 22 N. E. R. 393, 116 N. Y. 144.

¹ *Lindsley v. O'Reilly*, 50 N. J. Eq. 636, 15 Atl. R. 379.

² *Terry v. Smith*, 42 N. J. Eq. 504, 8 Atl. R. 886; *Holmes v. Tigges*, 42 N. J. Eq. 127, 7 Atl. R. 347.

³ *Mims v. Delk*, 42 S. C. 195, 20 S. E. R. 91.

⁴ *Davenport v. Kirkland*, 156 Ill. 169, 40 N. E. R. 304; *Crawford v. Wearn*, 115 N. C. 540, 20 S. E. R. 724.

⁵ *Hamilton v. Hamilton*, 98 Ill. 254; *Hanson v. Brewer*, 78 Me. 195, 3 Atl. R. 574; *Jones v. Atchison, etc. Co.*, 150 Mass. 304, 23 N. E. R. 48; *Hale v. Hale*, 137 Mass. 168, 170; *Lesser v. Lesser*, 32 N. Y. S. 167; *Potter's*

Ex'rs v. Adriance, 44 N. J. Eq. 14, 14 Atl. R. 16; *Lippencott v. Lippencott*, 19 N. J. Eq. 121; *Lindsley v. O'Reilly*, 15 Atl. R. 379, 50 N. J. Eq. 636; *In re Spears*, 10 Misc. R. 635, 32 N. Y. S. 819; *Meehan v. Brennan*, 16 App. Div. 395, 45 N. Y. S. 57; *Officer v. Board of Home Missions*, 47 Hun. 352; *Davoue v. Fanning*, 2 Johns. Ch. 252, 254. Cf. *Gammon v. Gammon*, 153 Ill. 41, 38 N. E. R. 890; *Valentine v. Wyson*, 123 Ind. 47, 23 N. E. R. 1076; *Gross v. Howard*, 52 Me. 192; *Richardson v. Woodbury*, 43 Me. 206; *University v. Middleton*, 75 Md. 186; *Roe v. Vingut*, 117 N. Y. 204; *McMillan v. William Deering Co.*, 129 Ind. 70, 38 N. E. R. 398; *Griffin v. Griffin*, 141 Ill. 373, 31 N. E. R. 131; *Arrott's Estate*, 9 Pa. Co. Ct. R. 535; *Whittemore v. Russell*, 80 Me. 297.

convenient partition among beneficiaries, no power of sale is to be implied in trustees or executors from a direction to "pay" or "divide" it.¹

The power of sale in the executor, whether express or implied, will be strictly construed. The presumption is that a power of sale, though for the purpose of paying debts, does not ordinarily include the power to mortgage,² or to lease, though for a very long term;³ to build;⁴ to barter lands;⁵ or to divide the lands among the heirs by a friendly partition.⁶ Where it clearly appears that the purpose of the power of sale was to pay debts, or to remove prior mortgages on the land, a power to mortgage will be implied.⁷ Where a trustee of property was authorized to take up two mortgages, foreclosure of which was threatened, and to hold the property until a favorable time for its sale, and an advantageous sale was not possible, he had implied power to mortgage the property to pay the two mortgages.⁸

¹ *Potter v. Ranlett*, 74 N. W. R. 661 (Mich., 1898).

² 4 Kent, Com., p. 331; *Leavitt v. Pell*, 25 N. Y. 474; *Arlington State Bank v. Paulsen* (Neb., 1899), 78 N. W. R. 303; *Smith v. Hutchinson*, 108 Ill. 662; *Deery v. Hamilton*, 41 Iowa, 16, 17; *Iowa Loan Co. v. Holderbaum*, 86 Iowa, 1; *Wood v. Goodridge*, 6 Cush. (Mass.) 117, 123; *Hoyt v. Jaques*, 129 Mass. 157, 158; *Arnoux v. Phylfe*, 6 App. D. 605, 89 N. Y. S. 973; *Greene v. Greene* (R. L., 1897), 35 Atl. R. 1042; *Allen v. Ruddall*, 29 S. E. R. 198; *Willis v. Smith*, 66 Tex. 51, 17 S. W. R. 247; *Green v. Claiborne* (Va., 1896), 5 S. E. R. 376.

³ *In re Freeman*, 37 Atl. R. 591, 181 Pa. St. 405, 408.

⁴ *Rose v. Rose*, 6 Dem. Sur. (N. Y.) 26.

⁵ *Columbus v. Humphries*, 64 Miss. 582, 1 S. R. 232; *Lilley v. Providence Co.*, 16 R. L. 245, 14 Atl. R. 915.

⁶ *Braunsdorf v. Braunsdorf*, 23 N. Y. S. 722.

⁷ *Arlington Bank v. Paulsen* (Neb., 1899), 78 N. W. R. 303; *Hoyt v. Jaques*, 129 Mass. 286, 287, 1 Am. Pro. R. 159; *Inman v. Crawford*, 89 Fed. R. 232;

Ball v. Harris, 4 My. & Cr. 264; *Devaynes v. Robinson*, 24 Beav. 86; *Page v. Cooper*, 16 Beav. 396; *Stronghill v. Anstey*, 1 De Gex & G. 635; *Haldenby v. Spofforth*, 1 Beav. 390. Cf. *Rogers v. Rogers*, 111 N. Y. 228, 18 N. E. R. 636. A testator gave his real and personal property to trustees on trust for sale, with a discretion as to the postponement of any such sale, and then empowered his trustees, during postponement, to manage or cultivate his real and leasehold estates, and to make any outlay they considered proper out of the income or capital of his real or personal estate, for the renewals of leases, etc., improvements, repairs, or otherwise for the benefit of his real or personal estate. The will contained no express power for the trustees to mortgage. Held, that the trustees had power to raise money for the purposes specified by mortgage or charge of the unsold real estate. *In re Bellinger*, 67 Law J. Ch. 580, 2 Ch. 534, 79 Law T. (N. S.) 54; *Durell v. Bellinger*, Id.

⁸ *Gilbert v. Penfield*, 56 Pac. R. 1107 (Cal., 1899).

So a general power conferred on the executor to sell land as the "proper and convenient settlement of the estate may require" does not authorize a sale of the land which composes the bulk of the testator's estate merely to facilitate division among the devisees, but the power of sale can only be exercised to raise money to pay debts, legacies and administration charges, where the personal property proves insufficient for the purpose.¹ If the power of sale conferred on an executor expressly refers to "*all the land or real estate of the testator*," the executor may sell all land, whether it is devised by the will or not.² A power of sale conferred upon the executor "to sell any or all the land" of the testator authorizes a sale of a particular parcel of land, if the sale becomes necessary, although the testator has, in a subsequent clause of the will, directed it to be set apart and used for charitable purposes.³

And the fact that an executor to whom a power of sale over all the land of the testator is given is himself a devisee in absolute terms of a portion of the land is not material to prevent him from exercising his power of sale as an executor to dispose of land to which he has an absolute title in fee simple. But the power of sale which he has as an executor does not cut down his absolute title in fee, and if it is not exercised for the purposes required it will be extinguished. Independently of statute, full power to sell or otherwise alien "as fully as the testator would if living" may be validly executed though no license has been obtained from the court.⁴ But where no ex-

¹ Allen v. Dean, 148 Mass. 594, 20 N. E. R. 314.

² Hale v. Hale, 125 Ill. 399, 17 N. E. R. 470; Petit v. Railroad Co. (Mich., 1897), 72 N. W. R. 238; Ness v. Davidson, 45 Minn. 424, 48 N. W. R. 10; Brown v. Brown, 106 N. C. 451, 11 S. E. R. 647; Saunders v. Saunders, 108 N. C. 327, 12 S. E. R. 909; Epley v. Epley, 16 S. E. R. 321, 111 N. C. 505; Knapp v. Knapp, 46 Hun, 190; Pollock v. Hooley, 22 N. Y. S. 215, 67 Hun, 370; Cruikshank v. Parker, 51 N. J. Eq. 21, 26 Atl. R. 925; Adam's Estate, 148 Pa. St. 394, 23 Atl. R. 1072, 30 W. N. C. 82; O'Rourke v. Sherwin, 156 Pa. St. 285; Wood v. Hammond,

16 R. I. 98, 18 Atl. R. 198; Anderson v. Butler, 31 S. C. 183, 9 S. E. R. 797.

An executor, in whose discretion the mode of selling is placed, may sell either by public or private sale. Wood v. Hammond, 16 R. I. 98, 18 Atl. R. 198.

³ In re Rogers' Estate, 172 Pa. St. 428, 435, 39 Atl. R. 1109.

⁴ Woolworth v. Root, 40 Fed. R. 723; De Zeranikov v. Burnett (Tex. Civ. App., 1897), 31 S. W. R. 71; In re Williams, 92 Cal. 183, 28 Pac. R. 227; Allen v. Barnes, 5 Utah, 100, 12 Pac. R. 912; Schroeder v. Wilcox (Neb.), 57 N. W. R. 1031; Smith v. Swan, 2 Tex. Civ. App. 563, 22 S. W. R. 247.

press power of sale is given,¹ or where the power of sale is to be exercised for a special purpose, or in a special manner *not expressly authorized by the will*, the permission of, or confirmation by, the court is always desirable, if not indispensable.² Thus, though lands are liable for the debts of the testator, the executor is not able to sell them if not expressly empowered to do so by the will, unless with the permission of a court of probate.³ If the statute requires that the sale shall be confirmed by the court of probate, a good title cannot be given until a decree is obtained confirming the sale.⁴

§ 784. **The execution of a power of sale by surviving executors.**—A power of sale to several executors is a joint power, and independently of statute the joint power can only be exercised by all on whom it is conferred.⁵ By statute 21 Henry VIII., chapter 4, which is incorporated by implication, or has been expressly re-enacted in almost every state of the Union, a power of sale which is given to several executors, all of whom do not qualify, may now be executed by those who do qualify.⁶ So where a power of sale or any other power, whether it be a power appurtenant or collateral, is conferred upon two or more executors, and some renounce or *fail to qualify*, those who do qualify may execute the power.⁷ The execution of the power will be valid both at law and in equity whether the executors or trustees were expressly appointed as tenants in common or as joint tenants.⁸ Where the power is given to several exec-

¹ *Stevens v. Burgess*, 61 Me. 89, 97.

² *Wood v. Hammond*, 16 R. I. 98; *Pennsylvania Co. v. Bauerle*, 143 Pa. St. 459, 33 N. E. R. 166; *In re Bagger's Estate*, 78 Iowa, 171, 42 N. W. R. 639; *Bates v. Leonard*, 99 Mich. 296, 58 N. W. R. 811.

³ *Gibson v. Farley*, 16 Mass. 280, 284.

⁴ *Carter v. Van Bokkelen*, 20 Atl. R. 781, 73 Md. 175. See also *Seeger v. Leakin*, 76 Md. 500, 25 Atl. R. 862. Under a provision "that my trustee shall have power from time to time, when it shall be deemed for the best interest of my estate, to sell any part thereof for the improvement and benefit of the remainder," the trustee may exercise the power of sale whenever, in his discretion, he finds the

conditions prescribed to exist. *Beers v. Narramore*, 61 Conn. 13, 22 Atl. R. 1061.

⁵ *Dyer*, 219a; *Cro. Car.* 382a.

⁶ *Co. Lit.* 112b, 113a, 181b; *Shepard's Touch.*, p. 429, pl. 9; *Dyer*, 177; 4 *Kent*, p. 319.

⁷ By the terms of a will the whole estate was to "be appraised and divided, by my executors hereinafter named, into two equal shares." *Held*, to create a power coupled with a trust, and to be executed by the executors *virtute officii*, and that an appraisal and division by the only executor who qualified were valid. *Smith v. Winn* (S. C.), 4 S. E. R. 240.

⁸ *Wardwell v. McDowell*, 31 Ill. 364; *Warden v. Richard*, 11 Gray (Mass.),

utors and *all qualify*, the power may be executed by the survivors after the death of one or more.¹ And this is *a fortiori* the case where the testator has expressly provided that a power shall be executed by *his executors or trustees and by the survivor or survivors of them*.² Where a testator gives lands to one trustee named, with discretionary power of sale to "executors, . . . or the survivor of them, as executors or trustees," confiding in the discretion of said "executors and trustees," the power is annexed to the office, and not to the person named as trustee, and his successor has the power to convey.³ But where a power has been conferred by the testator upon several executors or trustees jointly, and all are alive and have accepted the office, the instrument purporting to execute the power must be executed by all of them.⁴ Where the power of sale is expressly conferred upon the majority of the executors named in the will, an execution by one executor is invalid,⁵ unless the sale

277; *Chandler v. Rider*, 102 Mass. 268, 271; *Putnam v. Fisher*, 36 Me. 523; *Vernor v. Coville*, 54 Mich. 283; *Herick v. Carpenter*, 92 Mich. 440, 52 N. W. R. 747; *Lippencott v. Wikoff* (N. J. Eq., 1896), 33 Atl. R. 305, 307; *Weimar v. Fath*, 43 N. J. Law, 1; *Denton v. Clark*, 36 N. J. Eq. 534; *Hyatt v. Aguero*, 1 N. Y. S. 339; *Jackson v. Ferris*, 15 Johns. (N. Y.) 347; *Taylor v. Morris*, 1 N. Y. 341; *Niles v. Stevens*, 4 Denio (N. Y.), 402; *Zebach v. Smith*, 3 Binn. (Pa.) 69; *In re Bailey*, 15 R. I. 60, 1 Atl. R. 131; *De Saussure v. Lyon*, 9 Rich. (S. C.) Eq. 492; *Smith v. Winn*, 27 S. C. 591, 4 S. E. R. 240; *McCown v. Terrell* (Tex., 1898), 40 S. W. R. 54; *Melms v. Pfister*, 59 Wis. 186, 189; *Adams v. Taunton*, 5 Madd. 435; *Forbes v. Peacock*, 11 M. & W. 636; *Peter v. Beverly*, 10 Peters (U. S.), 532, 564.

¹*Security v. Cone*, 64 Conn. 579, 31 Atl. R. 7; *Wolfe v. Hines*, 93 Ga. 329, 20 S. E. R. 322; *Gutman v. Buckler*, 69 Md. 7; *Poole v. Anderson*, 80 Md. 454; *Parkers v. Sears*, 117 Mass. 513, 521; *Gould v. Mather*, 104 Mass. 283, 290; *Carroll v. Conley*, 56 Hun, 649; *Cowles v. Reavis*, 109 N. C. 417; *Bredenbergh v. Barden*, 36 S. C. 197, 15

S. E. R. 372; *Chapman v. Connell*, 30 S. C. 549; *McDonald v. Hamblen*, 78 Tex. 628, 14 S. W. R. 1042.

²*Safe Dep. & Trust Co. of Baltimore v. Sutro*, 75 Md. 361, 23 Atl. R. 732; *Boutelle v. Savings Bank*, 17 R. I. 781, 24 Atl. R. 838; *Freeman v. Prendergast*, 94 Ga. 369; *Bradford v. Monks*, 132 Mass. 405, 407. It is always necessary, in order that the grantee shall have notice, that the death of the executor or of the trustee shall be recited in the deed executing the power.

³*Boutelle v. City Sav. Bank*, 24 Atl. R. 838, 17 R. I. 781.

⁴*Shaw v. Canfield*, 86 Mich. 1; *Pennsylvania Co. v. Bauerle*, 143 Ill. 459, 33 N. E. R. 166; *Wright v. Dunn*, 73 Tex. 293, 11 S. W. R. 330. A statute providing that, in construing laws, words purporting to give a joint authority to three or more public officers or persons confer the power on a majority, unless otherwise provided, does not apply to such a case. *Crowley v. Hicks*, 72 Wis. 539, 545, 40 N. W. R. 151.

⁵*Dodge v. Tulloch* (Mich., 1897), 68 N. W. R. 239.

be subsequently ratified by the other executors.¹ The English rule is that where a power is given to two or more persons *nominatim*, whether individually or as executors, it does not survive without express words to that effect; but where it is conferred on several executors or trustees as a plural body, as to "my executors," or "my trustees," it will survive so long as two or more executors or trustees survive.² Where a power of sale is *expressly limited* to the acting trustees and to the survivor and to those who may succeed to the trust, a deed is invalid which is executed by the survivor, no trustees having been appointed in the place of those who had died.³

A mandatory power of sale, or any other power which is to be exercised *ratione officii* by a single executor, and he dies or resigns before the execution, may usually be exercised by the administrator with the will annexed, under an order of the court.⁴

But where the power conferred upon the executor is a personal, confidential or discretionary power and not *ratione officii*, it cannot, after the death of the executor, be exercised by the administrator with the will annexed.⁵ This would be the case

¹ *Dunn v. Renick*, 80 Md. 454, 22 S. E. R. 60.

² Sugden on Powers, § 159. The power of the testator to direct that a power of sale or other power shall be exercised *jointly and not severally*, or to require that all the executors appointed by him shall join in its execution, with the alternative that it shall expire and be void in case any one of two or more persons who are to execute it shall die before its execution, is of course undisputed. See *Herriot v. Prime*, 33 N. Y. S. 970, 87 Hun, 95.

³ *Correll v. Lauterbach*, 14 Misc. R. 469, 36 N. Y. Supp. 615.

⁴ *Penn v. Folger*, 77 Ill. App. 365; *Davis v. Hoover*, 112 Ind. 423, 14 N. E. R. 468; *Griggs v. Veghte*, 47 N. J. Eq. 179, 19 Atl. R. 867; *Joroleman v. Van Riper*, 44 N. J. Eq. 299; *Drummond v. Jones*, 44 N. J. Eq. 53; *Schroeder v. Wilcox* (Neb., 1895), 57 N. W. R. 1031; *Greenland v. Wad-*

dell, 116 N. Y. 234; *Meehan v. Brennan*, 45 N. Y. S. 57; *Cohea v. Johnson*, 69 Miss. 46, 13 S. R. 40; *Robinson v. Ostendorff*, 38 S. C. 66, 16 S. E. R. 371; *Lahey v. Kortright*, 132 N. Y. 450, 30 N. E. R. 989; *Venable v. Merc. Trust & Deposit Co.*, 74 Md. 187, 21 Atl. R. 704; *Putnam v. Story*, 132 Mass. 205, 213; *Chandler v. Rider*, 102 Mass. 268, 271; *Blake v. Dexter*, 12 Cush. (Mass.) 559; *Larned v. Bridge*, 17 Pick. (Mass.) 329.

⁵ *Lucas v. Price*, 4 Ala. 697; *Palmer v. Moore*, 82 Ga. 177, 8 S. E. R. 180; *O'Brien v. Battle*, 98 Ga. 766, 25 S. E. R. 780; *Nicoll v. Scott*, 99 Ill. 259; *Hodgen v. Toler*, 70 Iowa, 21, 25; *Brown v. Hobson*, 3 A. K. Marsh. (Ky.) 380; *Gambel v. Trippe*, 75 Md. 252, 23 Atl. R. 461; *Wills v. Cowper*, 2 Ohio, 124; *Conklin v. Edgerton*, 21 Wend. (N. Y.) 430, 25 Wend. (N. Y.) 233; *Ross v. Barclay*, 18 Pa. St. 179; *Mordecai v. Schirmer*, 38 S. C. 294, 16 S. E. R. 889; *Vardaman v. Ross*, 36

where the executor has a discretionary power to distribute a fund among several persons in such proportions as he may see fit.

Nor can the donee of a discretionary power delegate his discretion to another person. Thus, a trustee having a discretionary power of sale over real property must himself select the time and the mode of sale, and he must also fix the price which he will accept.¹ But, having determined to sell and having fixed the price and the terms of sale, it is competent and proper for him to authorize an agent to contract for him and to attend to the delivery of the deed and to other minor details.²

In conclusion, it must be said the power of an executor or of a trustee to sell lands will not endure beyond the period in which the proceeds of the sale are to be applied by him. Thus, where an executor is empowered to sell land and apply the money received to A.'s support during her life, or until her attainment of majority, the executor's power of sale expires with the life or the majority of A.³ But an absolute and independent power con-

Tex. 111; *Hayes v. Pratt*, 147 U. S. 557, 13 Sup. Ct. R. 503; *Ingle v. Jones*, 9 Wall. (U. S.) 486, 498. The difficulty in these cases is to determine whether the power in the trustee or executor is given *ratione officii*, or whether it is given to him as an individual. The leaning of the courts is to construe all powers vested in a trustee or executor as given by reason of the office or trust conferred upon him. Thus a power to determine whether a legatee was making a proper use of "*his money*," and to withhold its payment, if, in the opinion of the executor, he was misapplying the same, has been held to be given *ratione officii*, and it is capable of being exercised by the court where the executor appointed died before executing the power. *Pedrick v. Pedrick*, 50 N. J. Eq. 479, 26 Atl. R. 267, affirming 21 Atl. R. 946. A will devised property to the testator's executors for a daughter during life, and provided that if the daughter married a discreet and prudent man,

and the executors or executor should be satisfied of the existence of such traits in the husband and should first give her a written testimonial to that effect, she should take the property in fee. *Held*, that the giving of the testimonial was not confined to all the executors, but the survivor might give it. *Viele v. Keeler*, 29 N. E. R. 78, 129 N. Y. 190.

¹ *Keim v. Lindley* (N. J., 1888), 30 Atl. R. 1063; *Whitlock v. Washburn*, 17 N. Y. S. 60, 62 Hun, 369; *Smith v. Swan*, 2 Tex. Civ. App. 453, 22 S. W. R. 247; *Roberts v. Roberts*, 71 Md. 1, 17 Atl. R. 568; *Reeves v. Brayton*, 36 S. C. 384, 395-397, 15 S. E. R. 658.

² *Keim v. Lindley* (N. J., 1888), 30 Atl. R. 1063; *Smith v. Swan*, 2 Tex. Civ. App. 453, 22 S. W. R. 247.

³ *Harmon v. Smith*, 38 Fed. R. 482; *Parrott v. Dyer* (Ga., 1898), 31 S. E. R. 417; *Fidler v. Lash*, 125 Pa. St. 87, 17 Atl. R. 240, 23 W. N. C. 449, where the proceeds of the sale were to be put at interest and the income paid to the widow of the testator for life.

ferred upon the executors to sell all or any of the testator's real estate at such times and in such manner as, in their judgment, they shall consider best for the interest of the estate, and to execute deeds therefor, is valid and continues, though trusts created by the will in no way connected therewith are declared void.¹

§ 785. **The acceptance of the trust.**—The testator cannot, by designating a person as trustee, compel him to serve as such. The person named must either *expressly* accept the trust or he must interfere with the control of the trust property in such a way that not to indulge the presumption that he has accepted the trust would result in injury to the *cestui que trust*. One who has been named as a testamentary trustee should, if he do not intend to accept, promptly renounce his appointment.² His refusal to accept will in no wise affect the validity of the trust. He may resign the trust after he has entered upon the performance of the duties attached to it; and, if he has not been guilty of malfeasance, and on his accounts being correctly rendered, his resignation will be accepted by the court of probate or a court of equity and a new trustee will be appointed in his place.

But so long as the relation of trustee and beneficiary exists, no mere lapse of time will estop the beneficiary from enforcing his rights to and in the trust property against the trustee. If the trustee has openly repudiated the trust, so that a knowledge of his repudiation has come home to the beneficiary in such a manner as to require the beneficiary to take immediate action, and he has not acted; or if other circumstances, aside from mere lapse of time, are shown, from which an extinguishment of the trust may be inferred, the *cestui que trust* is barred to assert the relationship.³

¹Lindo v. Murray (N. Y., 1899), 51 N. E. R. 1091, affirming 91 Hun, 335, 86 N. Y. S. 231.

²Saunders v. Richard, 35 Fla. 28, 16 S. R. 679; Salter v. Salter, 80 Ga. 178, 4 S. E. R. 39; Barclay v. Goodloe, 83 Ky. 493.

³Anderson v. Northrop, 30 Fla. 612, 12 S. R. 318; Kuton v. Kuton, 20 Mo. 530; Kune v. Bloodgood, 7 Johns.

(N. Y.) Ch. 89; Robinson v. Hook, 4 Mason, C. C. 139; Baker v. Whiting, 3 Sumn. C. C. 475; Boone v. Childs, 10 Peters (U. S.), 177, 223. Where A. is appointed trustee of two separate trusts, he may accept the one and renounce the other. Carruth v. Carruth, 148 Mass. 431, 19 S. E. R. 369. A trustee is estopped from denying the title or estate of the person for

§ 786. **The power of equity to appoint a new trustee.**—If the testator, whether inadvertently or with deliberation, shall fail to appoint a trustee, or if the trustee he appoints predeceases him,¹ or in case a trustee dies after he has accepted, but before he has performed a trust created by the will, or when the trustee renounces, or for any reason is unable to act as such, equity will appoint a new trustee in his place.² In the absence of a statute enacting a contrary rule, the legal estate in a trustee, if it is a fee, upon the death of the trustee descends to his heirs, though always subject to the obligations of the trust, the performance of which the beneficiary may compel against the heirs of a trustee to the same extent as against the ancestor. The heirs must either perform the trust or they must have a new trustee appointed by the court, where he is an active one.³ And it has been held in the English courts of equity from the time of Lord Eldon⁴ that every interest in trust to which the testator shall be entitled, and which he has the power to devise, *will pass under a general devise*, unless it is to be collected from the express language of the will, or from the purposes and objects of the testator, that he did not intend property held by him in trust to pass. The fact alone that there is other land to which the general devise may be applicable does not exclude this rule.⁵ But if the trustee has devised to A. all the estate which “*he holds as a trustee*,” a conclusive presumption is created that a residuary devise to B. will not include such estate. So, also, if the real property, which is included in

whose benefit it was created, and for whose use he holds it. *Sterling v. Sterling*, 79 N. W. R. (Minn., 1899), 525.

¹ *Woodruff v. Woodruff*, 44 N. J. Eq. 79, 16 Atl. R. 4.

² *Tainter v. Clarke*, 5 Allen (Mass.), 66; *In re Petrenak's Estate*, 79 Iowa, 410, 44 N. W. R. 685; *Slade v. Patten*, 68 Me. 380, 1 Am. Pro. R. 346, 349; *Fisher v. Dickenson*, 84 Va. 818, 4 S. E. R. 737.

³ *Gregg v. Gabbart* (Ark., 1897), 37 S. W. R. 232; *Russell v. Peyton*, 4 Ill. App. 273; *Clark v. Tainter*, 7 Cush. (Mass.) 567; *Ewing v. Shannon*, 103 Mo. 188, 20 S. W. R. 1065; *Gray v.*

Henderson, 71 Pa. St. 368; *Allen v. Baskerville* (N. C., 1898), 31 S. E. R. 383; *Evans v. Chew*, 71 Pa. St. 47; *Boone v. Childs*, 10 Peters (U. S.), 177, 213.

⁴ *Braybrooke v. Inskip*, 8 Ves. 417.

⁵ *Littleton's Case*, 2 Vent. 351; *Richardson v. Woodbury*, 43 Me. 206; *Abbot's Case*, 55 Me. 580; *Heath v. Knapp*, 4 Pa. St. 228; *Hughes v. Caldwell*, 11 Leigh (Va.), 343, 349. The early cases of *Attorney-General v. Butler*, 5 Ves. 340, and *Ex parte Brettell*, 6 Ves. 577, may be taken to have been overruled by *Braybrooke v. Inskip*, 8 Ves. 417.

the general or residuary devise, is to be used by the devisee in a mode which is incompatible with a trust estate in him, or is to be applied by him to carry out purposes which are contrary to the directions for the disposition of the property given by the creator of the trust, the general rule will not prevail. Accordingly, where the lands which are comprised in the general devise are charged with the payment of the debts of the testator, or are directed by him to be converted and the proceeds paid out in legacies, the trust estate does not pass by the general devise.¹ The same result would follow when the property devised, described as in trust, was subjected to a power of sale by the will for a specific purpose,² or was given in trust for the separate use of a married woman.³ The property for which the testator was a trustee will not pass under the general devise in such a case, where the intention of the testator as to its disposition by the devisee is totally repugnant to the purposes of the trust estate. And where the testator in disposing of land among two or more persons by a general devise makes them expressly tenants in common, or uses words requiring an equal division or partition of the property among them in shares, it will be conclusively presumed he does not mean to pass any interest to which he may be entitled as a trustee.⁴

Where a trust estate is devised to A. and his heirs, all discretionary powers, though given in the will to A. by name, descend from him on his death to his heirs and may be exercised by them, though all the heirs of A. should be appointed trustees.⁵ An intention to pass the trust estate is conclusively shown by a devise of "such estate and interest as may be vested in the testator as a trustee." Assuming that such a devise is valid, as, independently of statute, it would be, and that the legal title passes to the devisee of the trustee, it would seem reasonable to assume that the latter took it with all the powers, discretionary and ministerial, of his devisor. If the creator of the trust has seen fit to limit it to the heirs of the original trustee, who are not in being and who are unknown to him, he cannot

¹ *Roe d. Reade v. Reade*, 8 Term R. 118; *Morgan, Ex parte*, 10 Ves. 101; *Hope v. Liddall*, 21 Beav. 183; *Bellis' Trusts*, L. R. 5 Ch. D. 504.

² *In re Marshall*, 9 Sim. 555.

³ *Lindsell v. Thacker*, 12 Sim. 178.

⁴ *Thirtle v. Vaughn*, 2 W. R. 682, 24 Law Times, 5; *Martin v. Laverton*, L. R. 9 Eq. 563.

⁵ *Williams v. Moliere*, 15 Atl. R. 192, 60 Vt. 378.

object if the trustee devises the legal estate, as he has a right to do, to another who is equally a stranger. But in one well-considered English case where trustees had discretionary powers of distribution and appointment among the beneficiaries, and the survivor of them died, the court held that his devisee could not exercise the discretionary powers vested in his devisor.¹ The distinction is apparent between a devise made under such circumstances, and a devise of a trust estate, where the powers which attach to the trust do not call for the exercise of any discretion in a trustee, and may be performed by one person as well as by another. Even in the case of a trust for sale or a power of sale created in A. and his heirs, or in A. and B., or the survivor or the heirs of such survivor, where the direction to sell is mandatory, a sale being required to be made with all convenient dispatch, and the only discretion being a limited one as to time and mode of sale, it seems that the devisee of either trustee cannot exercise the power of sale any more than could an assignee of either trustee.² The creator of the trust having selected a particular person or class of persons to execute the power, its execution by another is invalid under the rule that the donee of a power cannot delegate its exercise to another. But, on the other hand, in case the devise in trust is not to A. and *his heirs*, but to A., *his heirs and assigns*, the devisee of the trustee may execute the power of sale or other discretionary power. The distinction arises from the use of the word *assigns* in the words of creation of the trust. This word is presumed to include a devisee, to whom, therefore, the trust property devised passes under the terms of the original trust and subject to it.³ A devise of a trust estate, by a trustee tak-

¹ Cole v. Wade, 13 Sim. 91.

² Cooke v. Crawford, 13 Sim. 91; Bradford v. Belfield, 2 Sim. 284; Stevens v. Austen, 30 L. J. Q. B. 212.

³ Titley v. Wostenholme, 7 Beav. 425; Mortimer v. Ireland, 6 Hare, 196; Ockleston v. Heap, 1 De Gex & M. 640. "It is plain that when C., who was the sole trustee of the legal estate in fee, saw fit to devise the legal estate that was vested in him, he did an act which he was not authorized to do. And here I must enter a pro-

test against the proposition, which was stated in the course of the argument, that it is a beneficial thing for a trustee to devise an estate which is vested in him in that character. My opinion is that it is not beneficial to the testator's estate that he should be allowed to dispose of it to whosoever he may think proper; nor is it lawful for him to make any disposition of it. He ought to permit it to descend; for in so doing he acts in accordance with the devise made to

ing under a trust, to the trustee, his *executors and administrator*, does not pass the trusteeship to the devisee, for *he* cannot claim under the limitations of the trust.¹ In all the cases where the trustee has devised or bequeathed the trust property to persons not mentioned in the creation of the trust to succeed him, the devise, though valid to convey the legal interest, does not operate as a transfer of the office of trustee nor as a delegation of any of the powers conferred upon the first trustee. The court of equity will appoint a new trustee and decree that the devisee shall convey to him, and direct an execution of the powers in question so far as possible in accordance with the intention of the original trust arrangement.

In New York state and perhaps in some other states by statute it is provided that, upon the death or the insolvency or the renunciation of the trustee, the estate shall vest in the supreme court, which has then jurisdiction to appoint a new trustee.² In those states the devisee of a trustee need not convey to a beneficiary.³ The trustee appointed by the court succeeds to all the rights and powers of the original trustee,⁴ unless the power is discretionary and involves a personal confidence reposed in the former trustee. If powers are given to the trustees *ratione officii*, as to the trustees generally, they may be exercised by a new trustee appointed by the court or by the survivors of several trustees.

Thus, where a power of sale is vested in a trustee, and he has an unlimited discretion, personal to himself, whether he shall exercise the power of sale at all, a new trustee cannot exercise

him. If he devises the estate, I am inclined to think that the court, if it were urged to do so, would order the cost of getting the legal estate out of the devisee to be borne by the estate of the trustee. I see no substantial distinction between a conveyance by act *inter vivos* and a devise; for the latter is nothing but a *post-mortem* conveyance, and if the one is unlawful the other must be unlawful." By Sir L. Shadwell, for the court in *Cooke v. Crawford*, 13 Sim. 91. And see also *Hall v. May*, 3 K. & J. 585; *Saloway v. Strawbridge*, 1 K. & J. 371.

¹ *Wilson v. Bennett*, 20 L. J. Ch. 879; *In re Burt*, 1 Drew. 319.

² *Kirk v. Kirk*, 137 N. Y. 510, 33 N. E. R. 552; *N. Y. Security & T. Co. v. Gas Light Co.*, 51 N. E. R. 1092 (N. Y., 1899).

³ *Robinson v. Schmitt*, 17 App. Div. 628, 45 N. Y. S. 258.

⁴ *Smith v. Hall* (R. L., 1898), 37 Atl. R. 698; *Wemyss v. White*, 34 N. E. R. 718, 159 Mass. 484; *Freeman v. Prendergast*, 94 Ga. 369; *Osborne v. Gordon*, 86 Wis. 92, 56 N. W. R. 334; *Cooper v. Illinois Cent. R. Co.*, 38 App. Div. 22, 57 N. Y. 925; *Lahey v. Kortright*, 30 N. E. R. 989, 132 N. Y. 450.

the power given.¹ But where the power *must* be executed by a trustee in order to carry out the intention of the testator, a different rule is applied. Where a sale is imperatively directed, and the trustees' discretion is only exercised in selecting the time or manner of sale ("as whenever and in such manner as they see fit"), a *duty towards others* is created that the court will enforce. The new trustee will have the rights and powers of his predecessor whose place he occupies. Equity will not permit the positive rights of the beneficiary to be prejudiced because of accident, or the neglect of a trustee.²

¹ Osborne v. Gordon, 86 Wis. 92, 98; and compare Cole v. Wade, 16 Ves. 27, 44; Lewin on Trusts, p. 239. A bequest in trust to pay the income of the trust fund to the child of the testator during her life, "and as much of the principal as shall seem to the trustee proper for her support and maintenance," does not create a mere naked power in the trustee which he may execute or not at his discretion, but imposes an imperative duty upon him to pay over so much of the principal as may be necessary for the support of the beneficiary. Hence the trust may be executed by a trustee appointed by the court upon the death of the original trustee, under R. S., § 2094, which vests in such trustee all the powers and duties of the original trustee. Osborne v. Gordon, 86 Wis. 92, 98, 56 N. W. R. 334.

² Wells v. Lewis, 4 Met. (Ky.) 271; Chase v. Davis, 65 Me. 102; Freeman v. Prendergast, 94 Ga. 369; Gibbs v. Marsh, 2 Met. (Mass.) 243, 253; Tainter v. Clark, 13 Met. (Mass.) 220, 225; Parker v. Converse, 5 Gray (Mass.), 336, 341; Nugent v. Cloon, 117 Mass. 219, 221; Wemyss v. White, 159 Mass. 484, 34 N. E. R. 718; Cleveland v. Hallett, 6 Cush. (Mass.) 403; Stewart v. Pettus, 10 Mo. 755; Bain v. Matteson, 54 N. Y. 663, 667; Pedrick v. Pedrick, 48 N. J. Eq. 313, 21 Atl. R. 946; Franklin v. Osgood, 14 Johns. (N. Y.) 553; Jackson v. Given, 16 Johns. (N. Y.)

167; Zebach v. Smith, 3 Binn. (Pa.) 69; Greer v. McBeth, 12 Rich. Eq. (S. C.) 254, 257; Osborne v. Gordon, 86 Wis. 92, 98, 99; Lane v. Debenham, 11 Hare, 188; Warburton v. Sands, 14 Sim. 622; May v. May, 17 S. Ct. 824 (U. S. 1897). Where an executor had a discretionary power to pay a legatee certain sums for his support, but if the latter did not make proper use of his money, then only to pay him enough for his board; and, if the son should die, then to his surviving issue absolutely, the court said the power was given to the executor *ratione officii* and might be exercised by his successor. Pedrick v. Pedrick, 50 N. J. Eq. 479, 26 Atl. R. 267. The supreme court of the United States has recently affirmed the well established doctrine that the testator may delegate to persons who are named in the will the power to remove a trustee and to appoint a new trustee in his place. This rule was discussed in a case where the heirs of the testator were given power "by their unanimous resolution," and with the concurrence of the widow of the testator, to remove a trustee for good and sufficient cause. No necessity exists to resort to a court of equity to determine the sufficiency of the cause, in the absence of a positive showing that the power to remove the trustee and to appoint a new one has been unjustly exercised. May v. May, 17 Sup. Ct. 824.

§ 787. **The removal of trustees.**—A trustee may be removed and a new trustee appointed in his place when it shall affirmatively appear to the court that the interest of the *cestui que trust* requires it. A trustee who becomes *non compos mentis*, permanently leaves the state, or wilfully neglects the performance of the duties of his trust, as where he neglects to pay over or account for income, or to meet the debts of the estate, may be removed.¹ And though no positive acts of neglect or wrongdoing by the trustee shall appear, if such a state of mutual ill-will exists between him and the beneficiary, without the latter's fault, that to continue him in his office of trustee would be detrimental to the latter, he ought to be removed.²

It will be presumed, in the absence of evidence to the contrary, that a trustee or an executor has properly performed the duties of his office. The burden of proof to show wilful neglect or misapplication of the trust funds upon his part, or to show that a state of affairs exists which renders it necessary to remove him, is upon the applicant for his removal. A good and sufficient cause for the removal must be shown. Merely to show that circumstances exist which *may* render his administration of the trust detrimental to the beneficiaries is not enough to effect his removal and the substitution of a new trustee. The circumstance that the testator was acquainted with his qualifications for the carrying out of the trust, and that he has selected him, and not another, to execute his testamentary intentions, should have some weight with the court in overcoming frivolous objections not involving any flagrant breach of trust.³

By modern statutes the new trustee becomes vested on his appointment *eo instanti* with the legal title and no conveyance to him is necessary. But in the absence of statute the former trustee must convey the legal title to his successor, and the

¹ *Bailey v. Bailey*, 2 Del. Ch. 95; *Estate*, 12 Pa. Co. Ct. R. 591; *Morgan's Collier v. Blake*, 14 Kan. 250; *Sparhawk v. Sparhawk*, 114 Mass. 856; *Estate*, 8 Pa. Co. Ct. R. 260; *Foss v. Sowles*, 62 Vt. 221, 19 Atl. R. 984; *McScott v. Rand*, 118 Mass. 215; *Preston Pherson v. Cox*, 96 U. S. 404.

v. Wilcox, 38 Mich. 578; *Gartside v. Gartside*, 113 Mo. 348, 20 S. W. R. 669; *May v. May*, 17 Sup. Ct. 824; *Wilson v. Wilson*, 145 Mass. 490, 14 N. E. R. 521; *Nathan's Estate* (Pa., 1899), 43 Atl. R. 313.

Green v. Blackwell, 31 N. J. Eq. 37; *In re McGillivray*, 33 N. E. R. 1077, 138 N. Y. 308; *Shepherd v. McEvers*, ³ See cases cited *supra*, in note 1, p. 1131.
⁴ *Johns Ch.* (N. Y.) 136; *Bloomer's Appeal*, 83 Pa. St. 45; *In re Simon's*

court of equity in removing him will ordinarily decree that he shall do so, and punish him for contempt in case of his refusal to convey.¹

§ 788. **The merger of the equitable and legal estates.**—If the legal and the equitable interests which are disposed of by the will become united in the same person, the equitable title is merged into the legal, under the rule that no man can be a trustee for himself. A merger takes place only where the two interests are of the *same character* and are acquired by the party in the *same capacity*. Thus, if the interest which the person has as a trustee is a *future* interest, and that which he has as a beneficiary is a *present* interest, or *vice versa*, no merger takes place. Thus, where land is devised to A. (who is the heir of the testator) for life, and the fee is devised in trust to B. for a purpose which fails, no merger takes place during the life of A., though A. ultimately takes the fee absolutely.² And, generally, where, because of the peculiar situation of those who are interested in the property, a merger would work an injustice to some of them, or if, from the language of the will, it is apparent that the testator's intention will be defeated if the equitable and legal interests are merged in the same person,³ equity will not permit a merger to take place. Thus, where the trust is an active trust requiring the interposition of a trustee to carry out the intention of the testator, and the beneficiary of the trust is the heir of the testator, there will be no merger where the trustee dies before the testator, and the land

¹O'Keefe v. Calthorpe, 1 Atk. 17; Greenhouse, Ex parte, 1 Madd. 109; Webster v. Vandeventer, 6 Gray (Mass.), 428; Wallace v. Wilson, 34 Miss. 357. The fact that the trustee is, by his own fault, on bad terms with the beneficiaries, that he exerts an undue control over the trust property against the wishes of the beneficiaries, has invested the property in ways which differed from the mode of investment directed in the will, and persistently refused to give the beneficiaries any information as to the condition of a corporation of which he was president and treasurer, and whose stock formed the

greater part of the trust fund, is a sufficient ground for his removal. Gartside v. Gartside, 113 Mo. 348, 20 S. W. R. 669.

²Greer v. Chester, 131 N. Y. 629, 36 N. E. R. 868, 62 Hun, 329, 17 N. Y. S. 238; Asch v. Asch, 113 N. Y. 232, 21 N. E. R. 70.

³Adams v. Angell, L. R. 5 Ch. D. 634, 641, 645; Chambers v. Kingman, L. R. 10 Ch. D. 743, 745; Donalds v. Plumb, 8 Conn. 453; Hopkinson v. Dumas, 42 N. H. 807; Cooper v. Cooper, 5 N. J. Eq. (1846), 9; Hunt v. Hunt, 14 Pick. (Mass.) 374; Nicholson v. Halsey, 7 Johns. Ch. (N. Y.) 422. See also 1 Spence's Eq. Jur., pp. 508, 572.

descends incumbered with the trust to the heir of the testator. The court will then appoint a new trustee.¹ So, also, where land is devised to a person (A.) in trust for another (B.) for the life of B., and on the death of the *cestui que vie*, then in remainder in trust for the heirs of B., and the trust, being passive, is executed in B., no merger of the legal and equitable estates will take place in B., where the result of the merger would be to bring into operation the rule in Shelley's case, and give B. the fee.²

§ 789. The protection and preservation of the trust property by the trustee — The degree of care required.— The trustee is *in law* the legal owner of the property. He is entitled to the possession of the trust property as against the *cestui que trust*. He is also the proper and necessary party to all actions at law relating to the possession or protection of the trust property and of its rents and profits. The right of a trustee, judicially appointed, to the trust property, cannot be attacked collaterally.³ This being the case, there is no necessity to make the beneficiary a party to any action at law relating to the trust. And it follows that a judgment against a trustee rendered during the existence of the trust relation is binding, in the absence of fraud, upon the beneficiaries and their personal representatives, heirs and next of kin.⁴

As a consequence of the complete supervision and control which a trustee has a right to exercise over the property, he is usually held to a strict accountability for the performance of his duties. As between the trustee and the *cestui que trust*, the obligations and duties of the former and the rights of the latter are to be determined wholly according to the terms of the will by which the trust was created. Equity has exclusive control to enforce these rights and to secure a proper performance of these obligations. But there are certain duties which

¹ Woodruff v. Woodruff, 44 N. J. Eq. 79, 16 Atl. R. 4. 22 App. Div. 24, modified; First Nat. Bank v. National Broadway Bank,

² Venables v. Morris, 7 T. R. 342; 51 N. E. R. 398, 156 N. Y. 459.

Silvester v. Wilson, 2 T. R. 444; Lord ⁴ Pollitz v. Trust Co., 53 Fed. R. 210; Say and Seal v. Jones, 3 Bro. C. C. 113. Robertson v. Van Cleve, 129 Ind. 217, 26 N. E. R. 899; Manson v. Duncan-
son, 17 S. Ct. 647; In re Stewart, 5
And see also Downes v. Grazebrook, 8 Mer. 200, 208; Selby v. Alston, 8 Ves. 389. N. Y. S. 127, 126 N. Y. 210, 27 N. E. R.

³ Judgment (1897), 47 N. Y. S. 880, 259.

are incumbent upon *all* trustees, whatever may be the nature of the trust estate, and whatever may be the special duties of the trustee in the particular case. Thus, it is the duty of a trustee, immediately upon his acceptance of the trust, to reduce all property which is outstanding into his possession without unnecessary delay. If the property consist of debts, he must collect them as soon as possible. If the trustee shall unreasonably delay to collect money which was due on debts forming a part of the trust estate, or if he shall neglect to take possession of land promptly, he will be personally liable for any damages which may result to the beneficiaries by reason of his negligence and delay.¹

The trustee is permitted to exercise a reasonable discretion in instituting legal proceedings to collect debts due the testator. If, from *all the facts*, a demand appears to be collectible by action, a failure to institute legal proceedings promptly may be negligence for which the trustee or the executor would be chargeable. On the other hand, a trustee or other fiduciary may refrain from litigation where there is a likelihood of large expense being incurred, and little or no probability of a successful termination of the action, or where a judgment would be uncollectible. If the duties of the trusteeship are so numerous and onerous that the trustee is unable to perform them himself, he may employ trustworthy agents. Thus, a trustee may employ an agent or attorney to collect moneys outstanding, and, unless he is guilty of negligence in the selection of the agent, he is not liable for losses occasioned by the agent embezzling or losing the money.² So a trustee may employ brokers or agents to purchase and sell the property under the trust, if such a method is the customary and usual one pursued by persons acting with reasonable care and prudence in the ordinary course of business of a like nature, and may commit to the care of these agents the trust property. If the trustee has exercised diligence in selecting such agents he is not liable for the loss of the property while it is in their hands.³ The

¹ *Hunt v. Gontrum*, 80 Md. 64, 30 Atl. R. 620.

² *Ex parte Belchier*, Amb. 218; *Tebber v. Carpenter*, 1 Madd. 291; *In re*

Brier, *Brier v. Evison*, L. R. 26 Ch. Div. 238, 242, 243.

³ *Speight v. Gaunt*, L. R. 9 App. 1; *Lewis v. Reed*, 11 Ind. 239; *Leggett v. Hunter*, 19 N. Y. 445.

trustee or executor, as soon as debts outstanding are collected, ought to deposit the proceeds in his name as trustee in an authorized depository for trust funds. If he shall keep the trust money on deposit in a bank to await investment, or to pay debts or legacies, or for other trust purposes, he will not be responsible in case of the failure of the bank.¹

A trustee is culpable if he shall permit the money to remain out of his actual possession for an unreasonable time. An executor who permits money to remain on deposit in a bank more than a year after the death of his testator, and perhaps for a shorter period if all the debts and legacies have been paid,² or a trustee who permits trust money to remain on deposit when the testator has directed its investment otherwise, or when the court has directed him to pay it over to his successor,³ or to deposit it with the clerk of the court,⁴ will be liable for the principal in case of the failure of the bank and for loss of income otherwise.⁵ A trustee should retain and deposit trust funds separate from his own. If he shall commingle trust money with his own so that they are indistinguishable, the *cestui que trust* is entitled to a preference over other creditors of the trustee.⁶

Where the fund in trust has been deposited in a bank to the trustee's individual credit, the *cestui que trust* need not prove that the identical money is on deposit, to sustain his claim

¹ Johnson v. Newton, 11 Hare, 160; Swinfen v. Swinfen, 29 Beav. 207, 211; Fenwicke v. Clark, 31 L. J. (N. S.) 728; Breneman v. Mylin, 12 Pa. Dis. Ct. R. 324.

² Darke v. Martyn, 1 Beav. 525; Moyle v. Moyle, 2 Russ. & My. 710.

³ Lunham v. Blundell, 27 L. J. (N. S.) 179.

⁴ Wilkinson v. Bewick, 4 Jur. (N. S.) 1010.

⁵ Brown v. Montgomery, 4 Salk. 853.

⁶ De Jarnette v. De Jarnette, 41 Ala. 709; Kneisley v. Weir, 81 Ill. App. 251; Mansfield v. Alwood, 84 Ill. 497; Tompkins v. Reynolds, 17 Ala. 109; Bohde v. Bruner, 2 Redf. (N. Y.) 333; Matter of Mount, 2 Redf.

(N. Y.) 405; Marsh v. Gilbert, 2 Redf. (N. Y.) 465; Denike v. Harris, 84 N. Y. 89; In re Holmes (N. Y., 1889), 53 N. E. R. 1126; Moyer v. Petway, 76 N. C. 327; Tucker v. Tucker, 33 N. J. Eq. 235; Crane v. Howell, 35 N. J. Eq. 374; Sullivan v. Howard, 20 Md. 194; Willes v. Gresham, 2 Drew. 258; Grove v. Price, 26 Beav. 103; Ex parte Ogle, L. R. 8 Ch. 711; Paddon v. Richardson, 7 De Gex, M. & G. 563; Marine Bank v. Fulton, 2 Wall. (U. S.) 252. And where the trustee dies, his personal representative must pay the *cestui que trust* before he can legally attempt to satisfy the claims of other creditors. Hunt v. Smith (N. J., 1889), 43 Atl. R. 423.

against the administrator of the trustee. It will be sufficient to show that the trust fund was deposited there by the trustee and that so much money was still to his credit in the bank.¹

It is the duty of the trustee to pay all taxes, interest on incumbrances on land, and to keep all buildings in repair, out of the income of the property, unless he is expressly directed to provide for these expenses out of the principal.² Where the property which is placed in trust is liable for the debts of the testator, or for charges which have been placed upon it by the will, the trustee is bound to see that they are promptly paid, and he will be personally liable for interest accruing thereon on his unreasonably delaying to do so.³ But it is not every debt which a trustee can pay. He must determine at his own peril whether the claim is valid and is justly due, and, if he shall exercise his judgment in a reasonable and prudent manner, and after making a reasonably careful inquiry, he will not be personally liable though the payment was wrongfully made.⁴

¹ *Wulbern v. Timmons* (S. C., 1899), 33 S. E. R. 568. When a trustee mixes his principal's money with his own so that it cannot be distinguished what particular part is trust money and what part is private money, equity will follow the money, by taking out of the trustee's estate the amount due the *cestui que trust*, notwithstanding there are no facts or inferences tending to show that the particular assets sought to be subjected were swelled or increased, except as that might normally happen by the condition of the trustee's estate resulting from the payment of some of his business debts with the money of another. *Bircher v. St. Louis Sheet Metal Ornament Co.*, 77 Mo. App. 509. Where one is shown to have had the possession of trust funds as trustee, and he mingles them with his own funds, it will be presumed that whatever money or property was used by the trustee after such commingling was his own, and was not the trust fund, and that

such fund remained in his hands, forming a part of the sum found in the possession of his administrator. Where trust moneys are shown to have been in the hands of a trustee at a certain date, and he paid interest on them until his death, the fact that he mingled part of the moneys with his own and deposited them in a bank is sufficient to entitle the *cestui que trust* to a preference over other creditors of the trustee, though it is impossible to point out the precise thing in which the trust fund has been invested, or the precise time when the conversion took place. *Order* (1899) 55 N. Y. Supp. 706, 37 App. Div. 15, affirmed. *In re Holmes*, 53 N. E. R. 1126.

² *Mansfield v. Alwood*, 84 Ill. 497; *Hepburne v. Hepburne*, 2 Bradf. (N. Y.) 74; *In re Albertson*, 46 Hun, 566; *ante*, § 436.

³ *Adair v. Brimmer*, 74 N. Y. 589.

⁴ *Draper v. Stone*, 71 Me. 175. The estate of one who held land in trust for a widow and her children, and

In every case, whether the trustee is collecting outstanding claims, enforcing contracts or paying debts, or whether he is caring for the preservation and the investment or re-investment of the property, the trustee will be held to *a high degree of care and intelligence*, and will be required to take every precaution which a reasonably prudent man would take of his own property. It is perfectly true that in many of the early cases a trustee was held to only a slight degree of care and that he was only considered *liable for gross negligence*. But this rule, it should be remembered, was due to the fact that a trustee, in the absence of statute, received no compensation for the performance of his fiduciary duties, and was based upon the rule that a gratuitous bailee was liable for gross negligence only, which does not now apply. At the present time, both in England and in America, testamentary trustees and executors receive a compensation, the amount of which is fixed by statute. Not only must a trustee exercise the highest degree of care and diligence in performing the duties of his trust, but he must conduct himself towards the beneficiaries in executing his trust with the most scrupulous good faith. If the trustee shall speculate with the trust funds, or if he shall invest them in improper securities, or if he uses them in his own business, he is not only liable for any loss which may result, but he must pay over to the beneficiaries any profit which has been made as well.¹ He ought in no case to be permitted to make any profit *individually* from his employment of the trust property except his commissions. So, if in managing the trust funds he shall mingle them with his own property, as, for example, by depositing trust money in his individual name in a bank, equity will hold him liable for any resulting loss or depreciation of the estate.

without their consent expended rents and profits in purchasing an outstanding title to the land, is liable for the amount so expended. Shaw v. Devecmon, 81 Md. 215, 31 Atl. R. 709. Where a trustee makes a promise that is in terms a personal one, and that is beyond his powers as executor and trustee, the fact that the consideration for such promise benefited the trust estate does not relieve him from personal liability.

Fehlinger v. Wood, 134 Pa. St. 517, 19 Atl. R. 746.

¹ O'Halloran v. Fitzgerald, 71 Ill. 53; Taft v. Stow (Mass., 1899), 54 N. E. R. 506; Trull v. Trull, 13 Allen (Mass.), 407; Marsh v. Renton, 99 Mass. 132, 135; Ulrici v. Boeckeler, 72 Mo. App. 661; Romaine v. Hendricksen, 27 N. J. Eq. 162; Blauvelt v. Ackermann, 20 N. J. Eq. 141, 148, 149; Fulton v. Whitney, 66 N. Y. 548.

Aside from any question of fraud or gross negligence, it is the rule, both in law and in equity, that an executor shall not be liable for losses occurring to the estate solely by reason of the default or negligence of his co-executor.¹ So, also, a trustee shall not be liable for the negligent act or the carelessness of his co-trustee in which he did not actively participate.² Thus, an executor will not be personally liable for the loss of the funds of the estate through the insolvency of a co-executor in whose custody they are, where the party in default was solvent at the death of the testator, and since that time no fact had come to the knowledge of his associate that would indicate he was insolvent.³ And, *a fortiori*, a trustee who is, with the consent of the beneficiaries, deliberately excluded from all active participation in the control and management of the trust property, which is exclusively under the management of a trustee who embezzles it, will not be responsible for the actions of the wrong-doer.⁴ If, however, a trustee or an executor has notice of the wrongful acts of an associate, and he is passive as regards such acts, he will be liable.⁵ As soon as the knowledge of the illegal investment, or illegal payment of trust funds, or of any other breach of trust, comes to his knowledge, he ought to protest against it, and to take immediate steps to recover the trust property and to protect what remains. His failure to act, or his silence, after the knowledge has come to him will be equivalent in law to gross negligence, and will render him personally liable for the tortious action of his associate, though he has never participated in it or derived any benefit from it.⁶

A trustee who joins with a co-trustee in signing a receipt for money which is to come under the trust is personally liable for only so much of *it as comes in his hands*. He cannot be called to account for that portion of it which is received and

¹ Townley v. Sherborne, Bridg. Reports, 35; Cro. Car. 312; Hargthorpe v. Mitford, Cro. Eliz. 318; Kerr v. Waters, 19 Ga. 136; White v. Bullock, 20 Barb. (N. Y.) 91.

² Ray v. Doughty, 4 Blackf. (Ind.) 115; Royal v. McKenzie, 25 Ala. 363; In re Westerfield, 53 N. Y. S. 25.

³ In re Myers' Estate, 187 Pa. St. 247, 42 W. N. C. 435, 41 Atl. R. 24.

⁴ In re Westerfield, 53 N. Y. S. 25.

⁵ In re Westerfield, 53 N. Y. S. 25; Monell v. Monell, 5 Johns. Ch. (N. Y.) 283; Dix v. Burford, 19 Beav. 409; Candler v. Tillet, 22 Beav. 257.

⁶ Lincoln v. Wright, 4 Beav. 427; Egbert v. Butler, 21 Beav. 560; Thompson v. Finch, 22 Beav. 226.

embezzled by his co-trustee without his knowledge, for usually the mere signing of a receipt by a trustee does not form an exception to the general rule that he is not liable for the wrongdoing of an associate. But this is to be understood with the qualification that the joining in the receipt for the money is done for mere conformity to the directions contained in the will. If the receipts of all trustees are not indispensable according to the terms of the trust, and a trustee unnecessarily joins in a receipt, he will be liable for the default of his co-trustee, though he may not have retained any of the money for which the receipt was given.¹ With executors the rule is quite the reverse. While it may be necessary, in the case of a trust, for both trustees to join in the receipts, or in deeds of conveyance to make a good title,² this is by no means necessary in the case of a transfer of the personal property by joint executors; so that if one, without the necessity for it, does so, he is presumed to have assumed a power over it, whether he in fact received it himself or not.³

§ 789a. A trustee cannot purchase the trust property — The remedy of the cestui que trust.—It is a general rule in equity, which may be subject to an exception created by the express language of the testator in the will, that a trustee in executing a power of sale over property, whether real or personal, cannot at the same time be the purchaser of the property. The sale may be set aside on the application of the *cestui que trust*. It is immaterial that the trustee paid an adequate price and that no actual or positive advantage was taken by the trustee; for, though these facts may be proved in a few cases, in most cases of purchases by trustees it is utterly impossible to discover any positive and decisive evidence upon this point.⁴ A purchase of trust property by a trustee is invalid

¹ *Heaton v. Marriott*, Pra. Ch. 173; *Fellows v. Mitchell*, 1 P. Wms. 81; *In re Fryer*, 3 K. & J. 317; *Brice v. Stokes*, 11 Ves. 319; *Stowe v. Bowen*, 99 Mass. 194; *Kip v. Deniston*, 4 Johns. (N. Y.) 92.

² See p. 1122.

³ *Brice v. Stokes*, 11 Ves. 319, 324, 325; *Chambers v. Minchin*, 7 Ves. 198; *Clark v. Jenkins*, 3 Rich. Eq. (S. C.) 318.

⁴ *Ex parte Lacey*, 6 Ves. 625, 627; *Fox v. Mackreth*, 4 Bro. P. C. Toml. 258, 2 Bro. C. C. 400, 2 Cox, 320; *Ex parte Bennett*, 10 Ves. 393; *Gibson v. Jeyes*, 6 Ves. 277; *Hall v. Hallett*, 1 Cox, 134; *Pike v. Vigors*, 2 D. & W. 262; *Ogden v. Larrabee*, 57 Ill. 389; *Jamison v. Glascock*, 29 Mo. 191; *Shute v. Austin* (N. C., 1897), 27 S. E. R. 90; *Martin v. Wyncoop*, 12 Ind. 266.

though it is made at an auction sale which is *the result of the action of a third party*, as when a sale is made *ab invito* upon the application of an execution creditor.¹ A sale made to a trustee through a third person, or to a trustee as the agent of a third person, is also invalid. But in all cases in which the invalidity of a purchase from himself by a trustee is in question, while it is not necessary to show that an *actual advantage was taken by the trustee or that the price paid was inadequate*, it is necessary to show that the relation of trustee and beneficiary existed *at the time of the purchase*, and for such a period prior thereto as to give the trustee an opportunity of acquainting himself with the value of the property which will in fact give him an advantage.

A trustee may legally purchase trust property *after he has ceased to fill the office of a trustee* of that property. But he cannot continue to act as a trustee until almost immediately prior to the consummation of the sale, acquiring, in his character of trustee, information which is his exclusively, and which gives him a manifest advantage of the *cestui que trust* when subsequently he stands in the attitude of a purchaser.² A purchase which has been made by the trustee during the existence of the fiduciary relation is not invalid if the *cestui que trust*, being *sui juris*, has had the situation thoroughly explained to him so that *he knows the sale is to the trustee*, and the trustee has disclosed to the beneficiary all information which he has acquired by his official position which would give him an advantage.³ But courts of equity are prone to regard a transaction of this sort with some prejudice, and it will be supported only upon the strictest proof of the highest degree of good faith on the part of the trustee. The burden of proof is upon him to show all facts which are a necessary basis for the presumption that the transaction was made in perfect good faith, and unless he shall do so the ordinary presumption will apply.⁴

¹ See cases cited last note; *Ex parte Lacey*, 6 Ves. 625, 629; *Ex parte James*, 8 Ves. 348.

² *Downes v. Grazebrook*, 3 Mer. 200, 208; *Ex parte James*, 8 Ves. 348, 352.

³ *Ex parte Lacey*, 6 Ves. 625, 626, 628; *Morse v. Royal*, 12 Ves. 373; *Coles v. Trecothick*, 9 Ves. 234, 247; *Rice v.*

Cleghorn, 21 Ind. 80; *Pratt v. Thornton*, 28 Me. 355; *Brown v. Cowell*, 116 Mass. 465; *Jennison v. Hapgood*, 7 Pick. (Mass.) 1; *Wormley v. Wormley*, 8 Wheat. 421. And see *Fox v. Mackreth*, *supra*.

⁴ "A trustee," said Lord Eldon, in *Coles v. Trecothick*, 9 Ves. 234, "may

The validity of a purchase by a trustee can be questioned only by the *cestui que trust*, or his heirs or personal representatives, after his death. A stranger to the trust has no standing in court upon this point.¹ The purchase by the trustee is not absolutely void. It is voidable merely; and it may be confirmed by those having interests in the trust property, either expressly or by their actions, and even by acquiescence for a long period after they shall have acquired a knowledge of the sale and its circumstances.² The party who confirms must of course be *sui juris*. He must act voluntarily and freely. It must be proved not only that he was free from the *least suspicion of pressure, fear or undue influence*, but also that he thoroughly understood that his language or his actions will have a confirmatory effect upon a transaction which he knows he has a right to set aside. In other words, he must know his rights and understand that he is waiving them.³

A presumption of ratification may arise from long-continued acquiescence. The objection to the validity of a sale by a trustee to himself must be raised within a reasonable time, the length of which will always depend upon the special facts of the particular case.⁴ Acquiescence alone, without anything more, may, if very long continued, operate as a confirmation of the purchase, particularly where the beneficiary was *sui juris* and had an opportunity for inquiry of which he neglected to avail himself. Particularly would this be the rule where the beneficiaries have silently stood by and permitted the property to be conveyed, not only to the trustee himself as an individual, but from him as an individual to a *bona fide* purchaser without no-

buy from the *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the *cestui que trust* intended the trustee should buy, and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in his character as a trustee. I admit it is a difficult case to make out wherever it is contended that the exception prevails.

¹ Boerum v. Schenck, 41 N. Y. 182; Johnson v. Bennett, 39 Barb. (N. Y.)

237; Newcomb v. Brooks, 16 W. Va. 82.

² Campbell v. Walker, 5 Ves. 678, 682; Murray v. Palmer, 2 Sch. & Lef. 474, 476; Morse v. Parker, 12 Ves. 353; Adams v. Clifton, 1 Russ. 297; Dover v. Buck, 5 Giff. 57; Stump v. Gaby, 2 De Gex, Mac. & G. 623.

³ Crowe v. Bullard, 3 Bro. C. C. 139; Jackson v. Jackson, 47 Ga. 99; Higgs v. Smith, 3 A. K. Marsh. (Ky.) 338; Evans v. Foreman, 60 Mo. 449.

⁴ Alexander v. Alexander, 46 Ga. 291; Campbell v. Walker, 5 Ves. 678, 680, 682.

tice of the trust, and the property had been greatly improved by the latter and has become enhanced in value. But generally, where mere silence is relied on as a confirmation, it must be shown that the *cestui que trust* knew of the fact that the trustee had purchased the property for himself. He need not have actual knowledge of the sale. The constructive notice arising from the recording of the instrument of conveyance to the trustee would probably be sufficient.¹

A beneficiary who elects to repudiate a purchase of the trust property by the trustee may insist upon a reconveyance of it to himself, or to a new trustee who is appointed by the court, if it still remains in the ownership of the trustee who has bought it.² The beneficiary may also insist upon a reconveyance where the property has been transferred to a purchaser with notice of the trust.³ He must *repay the purchase-money with interest*, and all moneys which have been legitimately expended on the property in repairs, and in improvements which are of a permanent character. If he is unable or unwilling to do this, a resale may be ordered by and under the direction of the court upon such terms as will secure to the trustee what he has expended.⁴

The decree must also direct that the trustee shall account for all rents received by him, as well as other profits resulting from the sale of the produce of the land while he held it. He is also responsible for waste, and for rent for any portion of the land which he actually occupied.⁵ If, after having purchased the property, the trustee has sold it to a purchaser in good faith and for a valuable consideration, so that it cannot be reconveyed, the trustee is liable for the amount which he received for the property, and *not merely for the amount for which he*, as a trustee, sold it to himself as an individual.⁶ And where under

¹ Wright v. Vanderplank, 2 K. & J. 1; Baker v. Bradley, 7 De Gex, Mac. & G. 507.

² Lord Hardwicke v. Vernon, 4 Ves. 411; Randall v. Errington, 10 Ves. 423; Hamilton v. Wright, 9 Cl. & Fin. 111, 123.

³ Dunbar v. Tredennick, 2 Ball & Be. 304.

⁴ Connecticut Mutual Life Ins. Co.

v. Stinson, 62 Ill. App. 319; Wright v. Bruschke, 62 Ill. App. 358.

⁵ Hall v. Hallet, 1 Cox, 134; Ex parte Hughes, 6 Ves. 624, 625; Campbell v. Walker, 5 Ves. 678; Ex parte Bennett, 10 Ves. 400, 401; Ex parte James, 8 Ves. 351; Ex parte Lacey, 6 Ves. 625, 630.

⁶ Mareck v. Minneapolis Trust Co. (Minn., 1896), 77 N. W. R. 728; Ex

the circumstances a reconveyance is possible, it ought to be made without prejudice to the rights of lessees, mortgagees and other incumbrancers in good faith and for value.

A trustee cannot, under a power to buy, sell to himself as trustee property which is owned by him as an individual during the existence of the fiduciary relation. The burden of proof to show that such a sale was made *bona fide*, and that no unfair advantage was taken of the confidence reposed in him, is upon him.¹

Under the presumption that every person who has a duty to perform will do properly what he is bound to do, it will be presumed from circumstances or from silence that trustees have executed a conveyance, or that they have properly performed other duties in conformity with the trust. No particular period of time is required to create this presumption. Though twenty and thirty years have in some cases been mentioned, in others a much shorter period has sufficed.²

§ 790. The liability of trustees for the investment of personal property in trust.—A trustee must follow very closely any express directions which are contained in the will, regulating the investment of the personal property which composes a part of the trust fund.³ If the trustee shall negligently permit money to remain in a bank, when, by withdrawing it and re-investing it in proper securities, he might have secured a larger income with equal safety to the principal, he will be liable to the beneficiary for the loss of income incurred.⁴ If

parte Reynolds, 5 Ves. 707; Hall v. Hallet, 1 Cox, 134.

¹James v. James, 55 Ala. 525; Munn v. Berges, 70 Ill. 604; Higgins v. Curtiss, 82 Ill. 28; Smith v. Howlett, 51 N. Y. Supp. 910, 29 App. Div. 182.

²Mathews v. Ward, 10 Gill & J. (Md.) 442; Moore v. Jackson, 4 Wend. (N. Y.) 59; Smith v. McIntire, 83 Fed. R. 456; Jackson v. Schaubert, 7 Cow. (N. Y.) 187, 200; Jackson v. Matzdorf, 11 Johns. (N. Y.) 91, 97; Goodtitle v. Jones, 7 T. R. 43, 45; Doe v. Syborn, 7 T. R. 2; England v. Slade, 4 T. R. 682.

³See ante, § 479 et seq.

⁴Treves v. Townshend, 1 Bro. C. C. 884; Browne v. Southouse, 3 Bro. C. C. 107; Franklin v. Frith, 3 Bro. C. C. 433; Browne v. Montgomery, 48 Ala. 353; Bemmerly v. Woodward, 57 Pac. R. 561 (Cal., 1899); Moore v. Beachamp, 4 B. Mon. (Ky.) 71; Nelson v. Bank, 27 Md. 53; Carr v. Laird, 27 Miss. 544; Knowlton v. Bardley, 17 N. H. 458; Jacob v. Emmitt, 11 Paige (N. Y.), 142; Grothe's Appeal, 135 Pa. St. 585, 26 W. N. C. 265, 29 Atl. R. 1058. Where trustees fail to keep the funds in trust properly invested, but mingle them with their own, and occasionally draw them from the bank for their own purposes,

the trustees comply, in a *reasonably careful manner*, with the directions of the will as to the mode of investing the trust fund, they are not personally liable in case the property is lost.

Where the trustee is directed by the testator, in general language, to keep the estate invested, or where the will is silent as to the mode of investment, the trustee *is expected to exercise the greatest care in investing and re-investing the funds*. He is not only required to do what a *reasonably cautious man would do* in investing his own money, but *he must employ the highest possible degree of care*.¹ In England, by statute,² trustees are now permitted to invest trust funds upon real securities and in stock of the Bank of England or Ireland, or in East India stock; and in the United States it is usually prescribed by statute that trust funds may be invested in government, state or specified municipal bonds, or in first-mortgage loans on improved real estate. Independently of these statutes equity does not recognize any securities as a proper investment for trust funds except government loans, as the three per cent. consols in England,³ and, in the United States, government bonds and first-mortgage loans on productive real estate.⁴

But in recent times, owing to the large amount of trust funds requiring investment, the relatively limited amount of such securities that are to be found, and the extremely low rate of interest which is paid upon them, a wider latitude in the investment of trust funds has been permitted to trustees by statute. A trustee may now, in many instances, invest in particular municipal securities, as in the bonds of the more prominent and

they will be charged with compound interest. *Bemmerly v. Woodward* (Cal., 1899), 57 Pac. R. 561.

¹ *In re Smith* (1896), 1 Ch. 71.

² Lord St. Leonard's Act, 22 & 23 Vict., ch. 35.

³ *Trafford v. Boehm*, 3 Atk. 444; *Caldecott v. Caldecott*, 4 Madd. 189.

⁴ *Wilson v. Staats*, 32 N. J. Eq. 523; *In re Craven*, 43 N. J. Eq. 416, 5 Atl. R. 816; *Miller v. Procter*, 20 Ohio, 444; *Gilbert v. Kolb*, 85 Md. 627, 37 Atl. R. 423; *Denike v. Harrison*, 84 N. Y. 89; *Marton v. Adams*, 1 Strob. Eq. (S. C.) 72; *Eckford v. De Kay*, 8 Paige (N. Y.), 89; *Mathews v. Hey-*

ward, 2 S. C. 239; *Brown v. Litton*, 1 Peere Wms. 141; *Pocock v. Reddington*, 5 Ves. 800; *Knight v. Earl of Plymouth*, 1 Dick. 126. The weight of the English cases is against the text. *Norbury v. Norbury*, 4 Madd. 191; *Widdowson v. Duck*, 2 Mer. 494; *Ex parte Calthorpe*, 1 Cox, 193. A purchase of government bonds of the Confederate States of America has been decided to have been an improper investment for trust funds. *Ferguson v. Epes*, 77 Va. 499; *Sharpe v. Rockwood*, 78 Va. 24; *Dietz v. Mitchell*, 12 Heisk. (Tenn.) 676; *Cocker v. French*, 73 N. C. 420.

wealthier cities. But in no case will he be relieved from a full responsibility for all loss where he loans trust money upon mere personal securities, unless he is expressly permitted to do so by the will,¹ or invests them in the stocks and bonds of private corporations.² The trustee who, without authority, invests trust funds in personal securities at a loss is not excused by the fact that the testator had been accustomed to loan money to the same person on similar security. For the trustee is not dealing with his own, but with the property of others to whom the testator has been generous.³ The fact that a higher rate of interest will be realized by a loan on a promissory note, or that the risk of loss is diminished by the personal obligation being jointly executed by two or more, or with responsible securities,⁴ is not material to justify the act of the trustee.

The testator may confer a power to invest in or loan money upon personal securities. Such investments are never favored in equity, and a power of investment couched in general terms or a direction to invest, leaving the character of the investment to the discretion of the trustee;⁵ as when, for example, the trustee is permitted to invest the funds "in such manner as he shall deem best for all concerned,"⁶ or where he has full power to "invest in any securities whatever,"⁷ does not give power to loan money on personal securities. An express power to invest money upon personal securities does not empower a trustee to

¹ *Hunt v. Gontrum*, 80 Md. 64, 30 Atl. R. 620; *Clark v. Garfield*, 8 Allen (Mass.), 827; *Dufford v. Smith*, 46 N. J. Eq. 216, 18 Atl. R. 1052; *In re Blauvelt*, 20 N. Y. Supp. 119, 2 Con. Sur. 458; *Jones v. Jones*, 50 Hun, 603, 2 N. Y. S. 844; *Tucker v. Tucker*, 33 N. J. Eq. 235; *Wilson's Appeal* (Pa., 1895), 9 Atl. R. 473; *Nyce's Appeal*, 5 Watts & S. (Pa.) 254, 258; *Johnson's Appeal*, 43 Pa. St. 471; *Spear v. Spear*, 9 Rich. Eq. (S. C.) 184; *Simmons v. Oliver*, 74 Wis. 633, 43 N. W. R. 561; *Terry v. Terry*, Finch, Prec. Ch. 273; *Ryder v. Bickerton*, 3 Sw. 80; *Vigras v. Binfield*, 3 Madd. 62; *Walker v. Symonds*, 3 Swanston, 63.

² *Mattocks v. Moulton*, 24 Atl. R. 1004, 84 Md. 545; *Kimball v. Redding*,

31 N. H. 352; *Adair v. Brimmer*, 74 N. Y. 539; *King v. Talbot*, 40 N. Y. 76; *English v. McIntyre*, 51 N. Y. S. 910, 29 App. Div. 182; *Worrell's Appeal*, 9 Pa. St. 508; *In re Keteltas*, 1 Con. Sur. 468, 6 N. Y. S. 668. Compare *Lovell v. Minot*, 20 Pick. (Mass.) 116; *Harvard College v. Emory*, 9 Pick. (Mass.) 446.

³ *Styles v. Guy*, 1 Mac. & G. 423.

⁴ *Watts v. Girdlestone*, 6 Beav. 188.

⁵ *Pocock v. Reddington*, 5 Ves. 704; *Mills v. Osborne*, 7 Sim. 80; *Westover v. Chapman*, 1 Coll. 177; *Attorney-General v. Higham*, 2 Y. & C. C. C. 634.

⁶ *Mattocks v. Moulton*, 24 Atl. R. 1005, 84 Me. 545.

⁷ *Lewis v. Nobbs*, L. R. 8 Ch. D. 591.

purchase his own promissory note, or one executed by his co-trustee,¹ or by one of the trustee's relations, or by a member of his family.² The language of the grant of power to loan trust funds on personal securities will be very strictly construed. If the consent of a beneficiary or of a co-trustee is required to be procured as a necessary preliminary to the valid exercise of the power, an investment without it will be *ultra vires*, and the trustee will be liable for a resulting loss.³ And though the trustee may be expressly authorized by the will to loan money to A. upon his note or bond, he ought not to do so if A., who was perfectly solvent at the death of the testator, has subsequently become insolvent so that loaning him money would be equivalent to the loss of it.⁴ A power to loan on personal security is not exhausted by one occasion of its exercise. It may be exercised as frequently as a favorable opportunity offers, but always within the limits laid down by the testator, and under circumstances which commend its exercise to the sound discretion of the trustee. A power giving a trustee the widest discretion in the investment of trust funds will not authorize him to employ the fund in trade or for speculation generally, except at the risk of the trustee.⁵

We have seen that in some states trustees may invest trust money in first-mortgage loans upon real property. A trustee who is authorized, either by the will or by the statute, to invest in either first or second mortgages must use the ordinary care of a prudent man in doing so. He must see to it that the value of the landed property exceeds the sum loaned upon it, so that in case a sale on foreclosure becomes necessary the equity of redemption will be sufficient, aside from a depreciation in the value of the property, which no careful person could foresee. A trustee ought not to loan more than two-thirds of the value of permanent property, as of land aside from buildings; while on the latter, no more than one-half the original value should be advanced. For while the value of land *may* diminish, the structures upon it are not only subject to depreciation in value,

¹ Paddon v. Richardson, 7 De Gex, 535; Greenham v. Gibson, 10 Bing. Mac. & G. 563; Forbes v. Ross, 2 Bro. 363, 374.

C. C. 430.

² Langton v. Olivant, G. Cooper, 63.

³ Cocker v. Quayle, 1 Russ. & My.

⁴ Boss v. Godsall, 1 Y. & C. C. C. 617.

⁵ Cock v. Goodfellow, 10 Madd. 489.

but to deterioration and dilapidation by reason of the lapse of time as well.¹

If the trustee shall exercise ordinary diligence in ascertaining the value of the property, he will not be responsible for a deficiency resulting from a depreciation which no person could foresee. He has a right to rely upon the opinions of competent surveyors and real-estate dealers, who are disinterested parties, as to the value of the property when he advances the money; but he has no right to rely upon the opinion of value furnished either by the mortgagor or by his agent.²

A trustee who ventures to loan on second mortgage must look very closely into the value of the property, for he will be personally liable for a deficiency upon foreclosure unless he purchases in the equity.³ And a trustee, under a "power to invest the trust funds upon real securities," including mortgages by deposit of title deeds, has no right to buy in the equity of redemption from the owner in order to protect a second mortgage which he has taken upon the property, and he will be liable for any loss resulting therefrom.⁴

A trustee who has invested in government or other bonds at a premium is not responsible for a loss of premium from their redemption by the government before maturity, where it was considered by careful investors that the bonds would not be paid until they became due.⁵ If the trustee neglect to follow the directions of the will for the investment of money in particular securities, he is liable at the option of the beneficiary either to what would have been made in income by such investment or to what has been actually received, or the court may order the trustee to be charged with compound interest on the whole amount. Where the will is silent as to the character of the investment, the fact that certain securities were bought and held by the testator may recommend them to the trustee where they are ordinarily regarded as a safe investment.⁶

¹ *Stickney v. Sewell*, 1 My. & Cr. 9; R. 423. Compare *Drosier v. Brereton*, *In re Godfrey*, *Godfrey v. Faulkner*, 15 Beav. 221; *Fitzgerald v. Pringle*, L. R. 23 Ch. Div. 483; *In re Blauvelt*, 2 Moll. 534.

² *Con. Sur.* 458, 20 N. Y. S. 119.

⁴ *Worman v. Worman*, L. R. 43 Ch. Div. 290.

² *Jones v. Lewis*, 3 De Gex & Smale, 471; *Norris v. Wright*, 14 Beav. 291, 301; *Sutton v. Wilder*, L. R. 12 Eq. 373.

⁵ *Hele's Appeal*, 132 Pa. St. 479, 19 Atl. R. 362.

⁶ *Reckham v. Newton*, 4 Atl. R. 758,

³ *Gilbert v. Kolb*, 85 Md. 627, 37 Atl. 15 R. I. 321.

§ 791. **The liability of a purchaser for the application of trust property.**—Where real property is devised in trust for sale and for the payment of debts *generally* out of the proceeds, and no particular debts are by the will *made a direct charge upon the land* or its proceeds, a purchaser from the trustee is not bound to see that a proper application of the purchase-money to pay the debts is made by him.¹ And generally a purchaser in good faith and for value, not having *actual notice* of the misapplication of the purchase-money by the trustee, or not knowing of the failure of the trustee to execute a general trust in conformity with the limitations contained in the instrument creating the trust, takes the property wholly discharged of the trust.² The same rule is applied to a trust to pay legacies and annuities generally out of the proceeds of land directed to be sold for that purpose.³ This is the rule where land is subjected to a general charge. But if the land is devised in trust to be sold and the proceeds devoted to the payment of a *particular debt*, or if the trust is for a *particular purpose*, the purchaser is then bound to see that the purchase-money is applied to the payment of that debt or to the particular purpose specified.⁴

If the land in trust is *specifically charged* with the payment of debts and legacies by the will, the charge is a lien upon it which the purchaser is bound to notice, and he therefore takes subject to the trust.⁵ Where the purchaser has *actual notice of the intention of the trustee to misapply* the purchase-money, *i. e.*,

¹ Potter v. Gardner, 12 Wheat. (U. S.) 498.

² Ellison v. Moses, 95 Ala. 221; Warnock v. Harlow, 96 Cal. 293, 81 Pac. R. 166; Seldner v. McCreery, 75 Md. 287, 23 Atl. R. 641; Andrews v. Sparhawk, 13 Pick. (Mass.) 393, 401; Laurens v. Lucas, 6 Rich. (S. C.) Eq. 217; Bailey v. Colton, 25 S. C. 436; Bank v. Smith, 17 R. L. 244, 24 Atl. R. 273; Young v. Mutual Life Ins. Co. (Tenn., 1898), 47 S. W. R. 428; Davis v. Christian, 15 Gratt. (Va.) 11; Hauser v. Shaw, 5 Ired. (N. C.) Eq. 357.

³ Sims v. Lively, 14 B. Mon. (Ky.) 435; Andrews v. Sparhawk, 13 Pick. (Mass.) 393, 401; Dewey v. Ruggles,

25 N. J. Eq. 35; Gardner v. Gardner, 3 Mason C. C. 218; Dowling v. Hudson, 17 Beav. 248; Page v. Adam, 4 Beav. 269; Jenkins v. Hiles, 6 Ves. 654.

⁴ Bugbee v. Sargent, 23 Me. 269, 271; Swasey v. Little, 7 Pick. (Mass.) 296, 300; McWaid v. Blair Bank (Neb., 1899), 79 N. W. R. 620; Leavitt v. Wooster, 14 N. H. 550; Harrison v. Fly, 7 Paige (N. Y.), 421; Rogers v. Ross, 4 Johns. Ch. (N. Y.) 404; Hoover v. Hoover, 5 Pa. St. 351; Binks v. Rokeby, 2 Madd. 238; Smith v. Guyon, 1 Bro. C. C. 186.

⁵ See § 403.

if he in fact *knows* that the trustee, in conveying the land, is acting in excess of his powers, the purchaser will take the property subject to a constructive trust in favor of the original beneficiaries.¹ A purchaser from a testamentary trustee is affected with record notice of his duties and powers and of the purposes of the trust as they are set out in the will. But a purchaser in good faith from the purchaser from the trustee does not have record notice of these facts sufficient to subject the property, when in *his* hands, to a constructive trust.²

The law recognizes a great difference between the liability of a purchaser or pledgee of personal property who takes from an executor and one who takes from a trustee. The ownership of the personal property is vested in an executor for the sole *purpose of administering the estate* of the testator; and, for this purpose, he must have the incidental power of disposing of the personal assets in his hands, either by sale or by pledge. On the other hand, the ownership of personal property by a trustee is *for custody and not for administration*. The executor on his appointment is *at once* vested with the ownership of all the personal property disposed of by the will. In modern times he is regarded as to such ownership merely as a *quasi*-trustee, for carrying out the purposes of the will, the payment of debts,³ and the settlement of the estate. He has the ownership of the personal property only so far as it is necessary for him to have it to enable him to effect the purposes of the will as they appear upon its face.⁴ The executor should, as soon as possible,

¹ *Williamson v. Morton*, 2 Md. Ch. 94, 102; *Shaw v. Spencer*, 100 Mass. 382, 389; *Otis v. Otis*, 167 Mass. 245, 45 N. E. R. 737; *Stark v. Olsen*, 44 Neb. 646, 63 N. W. R. 87; *Turner v. Hoyle*, 95 Mo. 337, 8 S. W. R. 157; *Nauman v. Weidman* (Pa., 1898), 37 Atl. R. 863; *Bomar v. Gist*, 25 S. C. 340; *Clyde v. Simpson*, 4 Ohio St. 445; *McCown v. Terrell*, 9 Tex. Civ. App. 66, 29 S. W. R. 484; *Hanrick v. Gurley* (Tex., 1899), 48 S. W. R. 994; *Claiborne v. Holland*, 88 Va. 1046, 14 S. E. R. 915; *Smoot v. Richards*, 8 Tex. Civ. App. 146, 27 S. W. R. 967.

² *Young v. Weed*, 154 Pa. St. 316, 82 W. N. C. 297. Where a trustee has

fraudulently disposed of the trust property contrary to the terms of the trust, the beneficiaries, on the termination of the trust, are entitled, in a court of equity, to have the conveyances set aside, and a partition of the premises between them. *Lehnard v. Specht*, 54 N. E. R. 315, 180 Ill. 208.

³ *Ante*, § 639 et seq.

⁴ *Chandler v. Chandler*, 87 Ala. 30, 6 S. R. 153; *Carter v. Bank*, 71 Me. 448, 449, 1 Am. Pro. R. 193; *Dalton v. Dalton*, 51 Me. 171; *Hutchins v. Bank*, 12 Met. (Mass.) 421, 432, 435; *Shirley v. Healds*, 34 N. H. 407, 411; *Peterson v. Bank*, 32 N. Y. 21, 41-47; *Ferrier v. Ferrier*, L. R. 11 Ir. 56.

sell all personal property which is not specifically bequeathed, in order that he may, out of the proceeds, pay the debts at once, and the general legacies. He may also, if it is in his opinion necessary for the protection of the estate, unless he is expressly prohibited by the will, mortgage or pledge any of the personal property which is not specifically disposed of.¹ It follows from this that a purchaser or a pledgee of negotiable paper, which he has received from an executor, is not responsible for the misapplication of the proceeds if the purchaser is not actually a party to the fraud of the executor, and if he does not *know that the latter is misapplying or intends to misapply* the funds.² But where the person dealing with the executor *knows*, or *has reasonable grounds for believing*, that the executor means to misapply the money, or if he is knowingly, in the transaction in which both are engaged, misappropriating the proceeds, he will be responsible to those who are beneficially interested in the will.³ Thus, if the party to whom the personal property of the estate has been conveyed by sale or by pledge has *actual knowledge* that the testator *left no debts for which a sale or a pledge was necessary*, the presumption of fraud is almost conclusive. And when, on account of the relation of the purchaser to the executor or to the estate, he *knows* that the executor is actually paying or securing his *own* indebtedness, and not that of the

¹ Carter v. Bank, 71 Me. 448, 450; McLeod v. Drummond, 17 Ves. 154, 163; Andrew v. Wrigley, 4 Bro. C. C. 125, 139; Earl v. Rigden, L. R. 5 Ch. App. 663; 3 Redf. Wills, ch. 8, § 32; 2 Williams, Ex'rs, p. 1001; Jelke v. Goldsmith (Ohio, 1898), 40 N. E. R. 167. An executor who is directed to carry on the testator's business has the power to incur debts for that purpose. Weddrop v. Wood, 26 Atl. R. 375, 154 Pa. St. 307; Palmer v. Moore, 82 Ga. 177, 8 S. E. R. 180.

² Hutchins v. Bank, 12 Met. (Mass.) 421, 423; Field v. Schieffelin, 7 Ch. (N. Y.) 150, 160; Berry v. Gibbs, L. R. 8 Ch. App. 747; Bonney v. Ridgard, 1 Cox, 145; Keane v. Roberts, 4 Mad. 332, 357; Andrew v. Wrigley, 4 Bro. C. C. 125; Gray v. Johnstone, 3 H. L.

C. 1; Scott v. Tyler, 2 Dick. 725; Humble v. Hill, 2 Vern. 444.

³ In re McComb, 117 N. Y. 378, 22 N. E. R. 1070; Clark v. Coe, 52 Hun, 379, 5 N. Y. S. 243; Mercantile Trust Co. v. Weld, 85 Md. 685, 36 Atl. R. 445; Horton v. Jack (Cal., 1897), 37 Pac. R. 652; Lowry v. Bank, Taney, C. C. 310, 330; Carter v. Manu. Nat. Bank, 71 Me. 448, 452; Gerger v. Jones, 16 How. (U. S.) 30, 37, 38; Ewer v. Corbet, 2 P. W. 148; McLeod v. Drummond, 17 Ves. 153; Drohan v. Drohan, 1 Ba. & Be. 185; Collinson v. Lister, 7 De Gex, M. & G. 633; Stronghill v. Anstey, 1 De Gex, M. & G. 635; Scott v. Tyler, 2 Dick. 725; Rice v. Gordon, 11 Beav. 265; Stokes v. Prance, 67 Law Ch. 69, 1 Ch. 212, 77 L. T. (N. S.) 595, 46 W. C. 183; Hall v. Andrews, 27 L. T. (N. S.) 195.

testator, as would be the case where a banker having on deposit securities belonging to the estate on the request of the executor applies a portion of them to pay a debt due from the executor individually to the banker, he is estopped from asserting that he is not liable to the next of kin for the misapplication of the assets of the estate. Such knowledge is enough to raise a conclusive presumption of fraud on the part of a purchaser, for he cannot shut his eyes to the actions of the executor savoring so strongly of fraud.¹

§ 792. **Definition of a precatory trust.**—A trust is precatory where property is given to a person absolutely by the will, and he is *entreated, admonished, recommended or desired to dispose of all or of a portion of that property in favor of another person mentioned*, and the language of the testator from the whole will seems to be imperative, and leaves no discretion in the legatee except as to the *quantum* and mode of conferring the benefit. To create a trust, and in order to make precatory words operative, it must appear that the estate vested in the first taker is not absolute, nor the power of disposal unrestricted. It must also appear that the subject of the devise, and the devisees therein, are both certain, and that the trust is definite; and that the language, as gathered from the whole context, is intended to be imperative, and not a mere matter of

¹ Shaw v. Spencer, 100 Mass. 382, 392; Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 150, 160; Petrie v. Clark, 11 Ser. & R. (Pa.) 77; Hill v. Simpson, 7 Ves. 152; Wilson v. Moore, 1 Mylne & K. 337; Walker v. Taylor, 4 Law Times, 845; Pannell v. Hurley, 2 Coll. 241; Rodenham v. Hoskins, 2 De Gex, M. & G. 903; In re Tanqueray, L. R. 20 Ch. Div. 465; In re Whistler, L. R. 35 Ch. D. 561; In re Venn, 8 Rep. 220 (1894), 2 Ch. 101. Where stock standing in the name of the testator is transferred by his executor to the trustee named in the will, and afterwards it is fraudulently transferred by the trustee, the corporation is chargeable with knowledge of the limited powers of the trustee, despite the lapse of time between the transfers. The corporation, having once

been informed of the existence of a will under which the trustee must act, continues chargeable with a knowledge of its terms. Marbury v. Ehlen, 72 Md. 206, 19 Atl. R. 648. But it seems that where the executor is a specific legatee of a security pledged or sold by him to secure or pay his own debt (Taylor v. Hawkins, 8 Ves. 209), and perhaps where he is the sole residuary legatee, or even one of several residuary legatees, fraud will not be presumed in the absence of actual knowledge on the part of the transferee that the debts of the testator were still unpaid. Nugent v. Gifford, 1 Atk. 463; Mead v. Orrery, 3 Atk. 235; Taylor v. Hawkins, 8 Ves. 209; Crane v. Drake, 2 Vern. 161; McLeod v. Drummond, 17 Ves. 153, 163.

discretion.¹ That the subject of the precatory trust, as is the rule with all trusts, must be certain, cannot be doubted. But if the intention certainly appears that the beneficiary is in any event to have *something substantial*, the fact that he may receive more or less according to the judgment of the legatee is not material.²

§ 793. Particular examples of language which is testamentary and not precatory merely.—A gift followed by language *desiring* the legatee “to give” to certain persons who are then mentioned,³ or *recommending*⁴ or “request-

¹ Hence, where a testator, who has derived all his property from his wife, in his will gives her the “remainder of his whole estate, . . . believing she will do justice between her relatives and mine at her death,” no trust is created in favor of either of the relatives of the testator or in favor of the devisee. *Hill v. Page* (Tenn., 1896), 36 S. W. R. 735.

² “When property is given absolutely to any person, and the same person is by the giver, who has the power to command, recommended or entreated, or wished, to dispose of that property in favor of another, the recommendation, entreaty or wish shall be held to create a trust: First. If the words are so used that upon the whole they ought to be construed as imperative. Second. If the subject of the recommendation or wish be certain; and thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain.” Lord Langdale, in *Knight v. Knight*, 3 Beav. 172; S. C., 11 C. & F. 513. “If there be a trust sufficiently expressed and capable of enforcement, it does not disparage, much less defeat it, to call it ‘precatory.’ The question of its existence depends, after all, upon the intention of the testator as expressed by the words he has used, according to their natural meaning, modified only by the context and the

situation and circumstances of the testator when he used them. On the one hand, the words may be merely those of suggestion, counsel or advice, intended only to influence, and not to take away, the discretion of the legatee growing out of the right to use and dispose of the property given as his own. On the other hand, the language may be imperative in fact, though not in form, conveying the intention of the testator in words equivalent to a command, and leaving to the legatee no discretion to defeat his wishes, although there may be a discretion to accomplish them by a choice of methods, or even to defeat and limit the extent of the interest conferred upon the beneficiary.” *Colton v. Colton*, 127 U. S. 300, 312, 320.

³ *Coburn v. Anderson*, 131 Mass. 513; *Mason v. Limbrey*, cited Amb. 4; *Erickson v. Willard*, 1 N. H. 217; *Burt v. Herron*, 66 Pa. St. 400; *Godfrey v. Godfrey*, 11 W. R. 554, 2 N. R. 16; *Foster v. Wilson*, 38 Pac. R. 1003.

⁴ *Webster v. Morris*, 19 Ves. 656; *Malim v. Keighley*, 2 Ves. Jun. 333, 529, 539; *Gilbert v. Chapin*, 19 Conn. 342. See also *Tibbits v. Tibbits*, 19 Ves. 656, where the testator “recommended” his devisee to continue A. in the occupation of a farm so long as A. managed it well and paid rent. A bequest to A. “recommending her to give to B. what she should die

ing”¹ a legatee to dispose of the property given to him to others, has been held sufficient to create a trust in favor of the other persons. So, too, where the testator gave a legacy “having confidence”² in the legatee, or “with *full confidence*,”³ with the *utmost* confidence,⁴ with *implicit confidence*,⁵ with the fullest confidence,⁶ “in the belief” that,⁷ “not doubting” that,⁸ under the “firm conviction” that,⁹ “trusting,”¹⁰ having “an absolute assurance” that¹¹ the beneficiary would apply a portion of it

possessed of,” creates the executor of A. a trustee where A. neglects to carry out the recommendation of the testator. *Horwood v. West*, 1 S. & S. 387. The English cases and one or two American authorities have relied greatly upon the word “recommend” to create a trust. They have gone too far in this, for the primary signification of the word when it is uncontrolled by the context is not mandatory, but leaves a large discretion to the legatee. The most recent cases take the stand that recommendatory language *alone* is never testamentary. *Johnston v. Rowland*, 2 De Gex & S. 256. In *Ford v. Fowler*, 3 Beav. 146, the testator, while bequeathing property to A., “recommended that she settle it for the benefit of B.” and her children. On the death of A. in the life-time of the testator it was held that B.’s children should receive the legacy because of the trust in their favor. So in *Cholmondeley v. Cholmondeley*, 14 Sim. 500, where the words were “earnestly recommending that the legatee take measures to secure the property to her children on her decease,” a trust was construed to be created in favor of the children.

¹ *Eddy v. Hartshorne*, 34 N. J. Eq. 419; *Colton v. Colton*, 127 U. S. 300, 317; *Eade v. Eade*, 5 Madd. 118; *Shelley v. Shelley*, L. R. 6 Eq. 540.

² *Dresser v. Dresser*, 46 Mo. 48; *Shepherd v. Nottidge*, 2 J. & H. 766.

³ *Knox v. Knox*, 59 Wis. 172-185; *Warner v. Bates*, 98 Mass. 274; *Cur-*

nick v. Tucker, L. R. 17 Eq. 320; *Le Marchant v. Le Marchant*, L. R. 18 Eq. 414; *Ware v. Mallard*, 21 L. J. Ch. 355.

⁴ *Ingram v. Fraley*, 29 Ga. 553.

⁵ *Steel v. Levisay*, 11 Gratt. (Va.) 454.

⁶ *Wright v. Atkins*, 17 Ves. 255; *Palmer v. Simmonds*, 2 Drew. 221; *Gully v. Crego*, 24 Beav. 185; *Shovelton v. Shovelton*, 32 Beav. 143. *Contra*, *Webbs v. Wool*, 2 Sim. 267; *Meredith v. Heneage*, 1 Sim. 542; *In re Adams*, 24 Ch. D. 199.

⁷ *Van Adee v. Jackson*, 35 Vt. 176.

⁸ *Taylor v. George*, 2 Ves. & Bea. 378; *Parsons v. Baker*, 18 Ves. 476; *Massey v. Sherman*, Amb. 520; *Wynne v. Hawkins*, 1 Bro. C. C. 179; *Malone v. O’Connor*, 2 Ll. & G. 465. In *Parsons v. Baker*, 18 Ves. 476, the devise was to A., “not doubting that in case he have no child he will give it to the female descendants of my sister in preference to any descendant of his own.”

⁹ *Barnes v. Grant*, 26 L. J. (N. S.) Ch. 92, 2 Jur. (N. S.) 1127.

¹⁰ *McNab v. Whitebread*, 17 Beav. 299; *Irvine v. Sullivan*, L. R. 8 Eq. 673; *Hadley v. Hadley* (Tenn., 1898), 45 S. W. R. 342. In *Baker v. Mosley*, 12 Jur. 740, a trust was held to have been created by the words “trusting that he will preserve the same so that on his decease it will go to” certain persons whose names are mentioned.

¹¹ *Gilpatrick v. Gliden*, 81 Me. 137.

to the benefit of persons who are mentioned, it was held that these words were imperative and testamentary and not precatory merely.

And where the testator stated that it was his "*dying request*" that a legatee should devote a portion of the money which was bequeathed to him to the benefit of some third person;¹ or the testator "hoped he would do so;"² or stated that it was his "wish and desire" that the legatee should do so;³ or that it was his "wish and will,"⁴ and the testator required and entreated him to do so;⁵ or the testator gave the legacy "well knowing" that the legatee would carry out his instructions as regards some third person,⁶ it has been held that a valid trust was created.

A devise to A., and "I advise him" to settle it upon himself and his issue, and in default of issue upon E. and his issue, constitutes a trust in favor of E. and his issue.⁷ And the words attached to an absolute gift, "to be disposed of in such manner as she may think proper for the benefit of the family . . . as near equal as can be,"⁸ and "I desire that my wife shall control the estate and shall divide and pay to my children," are testamentary and create a trust.⁹ So a statement that, "having implicit confidence in the goodness and kindness of my wife, I rely on her to make all needful provisions for the fut-

¹ *Pierson v. Garnet*, 2 Bro. C. C. 38, 226; *In re O'Bierne*, 1 Jo. & Lat. 352.

² *Harland v. Trigg*, 1 Bro. C. C. 142; *Paul v. Compton*, 8 Ves. 375.

³ *Hinman v. Poynder*, 5 Sim. 546; *Eales v. England*, 2 Ves. 546; *Williams v. McKinley*, 34 Kan. 514, 519. *Contra*, *In re Hamilton*, L. R. 2 Ch. 370, 12 Rep. 355; *Brasher v. Marsh*, 15 Ohio St. 103.

⁴ *Whiting v. Whiting*, 4 Gray (Mass.), 236, 240; *McKee v. Means*, 34 Ga. 349.

⁵ *Taylor v. George*, 3 Ves. & B. 378; *Provost v. Clark*, 2 Mad. 458. A valid trust is created by the words: "It is my will and desire that A., to whom I give this legacy, shall leave it to such of my relations as she shall think proper." *Birch v. Wade*, 3 V. & B. 198. So also a trust is created

by a "wish and request" that a legatee, and also a person who took nothing under the will, should care for and superintend the education of some third person. *Foley v. Parry*, 5 Sim. 138, 2 My. & K. 138.

⁶ *Bardswell v. Bardswell*, 9 Sim. 319, 323; *Briggs v. Penny*, 3 De Gex & Sm. 539, 3 Mac. & G. 546, 554; *Stead v. Mellor*, L. R. 5 Ch. D. 225, 227.

⁷ *Parker v. Bolton*, 5 L. J. Ch. 88.

⁸ *Ward v. Peloubet*, 10 N. J. Eq. (1854), 304.

⁹ *Ide's Ex'rs v. Clark*, 5 Ohio Cir. Ct. R. 239. The same construction was followed in the case of a recommendation to the wife of the testator to increase a legacy. *Eberhardt v. Perolin*, 48 N. J. Eq. 592, 23 Atl. R. 501.

ure wants of my brother," raises a trust in favor of the testator's brother.¹ If the language creating a precatory trust is directory and binding, it is no objection that the proportions in which the beneficiaries are to take are not pointed out. Where the legatee neglects or refuses to carry out the trust equity will enforce it; and where the proportion is left to the discretion of the trustee, equity will divide equally among all the beneficiaries.²

The obligation of a testator to care for A., either because the testator stands towards A. *in loco parentis*, or because he has received some benefit in his life from A., which he is morally, though perhaps not legally, obligated to return, should be considered in every case of an alleged precatory trust in favor of A. in order to ascertain the testator's intention. The law demands that a man shall be just before he is generous, and will encourage an inclination to provide for those who in life were dependent upon the testator, as against those who were not.³

§ 794. The modern rule as to the creation of precatory trusts.—Many of the older decisions went too far in raising trusts from vague words where the testator had employed the language of recommendation, entreaty or request. This inclination to favor the creation of trusts was doubtless to be attributed to the fact that legacies of personal property, in connection with which precatory words were most frequently employed, were exclusively cognizable by the English ecclesiastical courts, and to the influence of the rules and principles

¹ *Blanchard v. Chapman*, 22 Ill. App. 341. And in *Murphy v. Carlin*, 113 Mo. 112, 20 S. W. R. 786, language as follows: "It is my wish and desire that A. continue to provide for the comfort, care and education of J. M., now aged five years, who has been raised as a member of my family since his infancy, and to make suitable provision for him in case of her death," was held to be testamentary.

² *Liddard v. Liddard*, 28 Beav. 266. A gift couched in absolute terms, but which is made "in full faith that my husband will properly provide

for the two children of my deceased brother whom we have undertaken to raise and educate," was held to create a trust in favor of the two children. *Noe v. Kern*, 93 Mo. 367, 6 S. W. R. 239.

³ A direction that a legatee shall give to another person an annuity which is very small in proportion to the value of what the legatee is given, "if she should always find it convenient," is a trust which is dependent upon the convenience of the legatee and not upon her discretion. *Phillips v. Phillips*, 112 N. Y. 197, 19 N. E. R. 411.

of the Roman civil law upon the minds of the ecclesiastical judges. For it must be remembered, in endeavoring to arrive at a proper estimate of the force and application of any of the earlier adjudications upon this subject, that the Roman law as developed by Justinian and his coadjutors favored the creation of trusts, and by a variety of comprehensive phraseology conferred a large discretion upon the *praetor* in permitting them to be implied from words of recommendation and the like.¹ Hence it happened by the time the jurisdiction of the court of chancery had been extended to the construction of legacies, that the immense increase of wealth attendant upon the spread of English commerce at the beginning of the present century, resulting in vast accumulations of personalty to be disposed of by will, had produced a volume of adjudications extending and amplifying the doctrines of the ecclesiastical tribunals. The mistaken and officious kindness of the chancellor frequently interposed to create trusts for the benefit of persons mentioned in the will upon the slightest language of confidence or recommendation, or because of some faint expression of a wish or a desire, where the explicit expression of intention was absent; and often under circumstances where to raise a trust would be in direct opposition to the intention of the testator.² But the modern decisions have greatly limited the scope of the doctrine of precatory trusts. The current of the decisions, both in England and the United States, indubitably shows that precatory trusts are not to be favored, nor is their extension to be encouraged by the courts.³

¹ The language of the Roman law is "*rego, peto, volo, mando, fidei, tuae committe.*" Institutes, 2, 24, 3.

² In *Lambe v. Eames*, L. R. 6 Ch. 597. "In hearing case after case cited I could not help feeling that the officious kindness of the court of chancery in interposing trusts where the father of the family never meant to create trusts must have been a very cruel kindness indeed."

³ *Durant v. Smith*, 159 Mass. 229, 233; *Van Gorder v. Smith*, 99 Ind. 404; *Fullenwider v. Watson*, 113 Ind. 18, 19; *Rona v. Meier*, 47 Iowa, 607, 609; *In re Adams and the Ken-*

sington Vestry, 27 Ch. D. 394, 411; *Lambe v. Eames*, L. R. 6 Ch. 597; *Mussorie Bank v. Raynor*, 7 App. Cas. 821; *Stead v. Mellor*, 5 Ch. D. 225; *In re Moore*, *Moore v. Roche*, 34 W. R. 343. "I have no hesitation in saying myself, that I think some of the older authorities went a great deal too far in holding that some particular words appearing in a will were sufficient to create a trust. Undoubtedly confidence, if the rest of the context shows that a trust is intended, may make a trust, but what we have to look at is the whole of the will which we have to construe,

§ 795. **The relations between the trustee and the testator.** Much depends upon the relation existing between the testator and a legatee to whom precatory language is addressed in determining whether a trust is created. If the testator gives property to a stranger he must employ correct and technical terms to create a trust, or, if he shall not use the words "in trust," he must employ the language of command or imperative direction. When he speaks in his will to a wife or child whom he wished to act as a trustee, he may properly employ words of confidence, desire, entreaty or recommendation. The stranger, unless expressly appointed, is under no moral obligation to act as a trustee, and an entreaty, suggestion or recommendation would not be imperative to him; in his life the testator had no right to command him, and, unless he does it expressly by his will, he will not be presumed to have done so. But where the testator addresses precatory words of confidence or recommendation to those who during life he had a right to command, it may be presumed that he intended a mandatory injunction, though out of politeness he has used language which would seem to leave a wide discretion in such persons as to the disposition of the property.¹

§ 796. **Where the discretion is absolute no trust is created.**—Where property is by the will given to A. *in absolute terms*, with a request, recommendation or suggestion that he shall dispose of all or a part of it for the benefit of B., and the terms of the disposition in B.'s favor are not mandatory, but leave it to the discretion of A. whether he shall give B. anything or not, the language is precatory, and not testamentary,

and if the confidence is that she will do what is right as regards the disposal of the property, I cannot say that that is, on the true construction of the will, a trust imposed on her. Having regard to the later decisions, we must not extend the old cases in any way, or rely upon the mere use of any particular words, but, considering all the words which are used, we have to see what is their true effect, and what was the intention of the testator as expressed in the will." By Cotton, L. J., In re

Adams and the Kensington Vestry, 27 Ch. Div. 894.

¹ Warner v. Bates, 98 Mass. 274; Knox v. Knox, 59 Wis. 172, 183; Erickson v. Willard, 1 N. H. 217, 227, 228. "The words 'desire,' 'request,' 'recommend,' 'hope,' 'not doubting' . . . are to be construed as commands clothed merely in the language of civility, and they impose on the executor a duty which courts have in frequent instances enforced." Remarks of Woodbury, J., in Erickson v. Willard, 1 N. H. 217.

and no trust is created in favor of B. What language shall in every case be sufficient to create a trust cannot be stated in a general rule. Words of confidence, recommendation, hope or expectation, which in some cases have been held to create a trust, have in others been denied this operation. Thus, where property is given to A. in fee, with the expression of a "*wish*" *that the legatee will so arrange his affairs that whatever* may remain at his death will go to B., no trust for B. is created, for the limitation of *what remains* shows that the testator meant that A. might, in his discretion, consume or expend the whole.¹ And a mere *request* to a legatee that, upon his death, he will bequeath consumable articles to a person designated,² or a *wish* that he shall keep the property in his family,³ is merely precatory. The most recent cases do not incline to regard words of recommendation, hope or assurance as precatory. The first case, says Hart, V. C.,⁴ that construed words of recommendation into a command made a will for the testator. And if the donee has an unlimited discretion in express terms, the strongest words of recommendation will be disregarded by the court.⁵ Thus, for example, no trust is created where the testator gives property absolutely, "*recommending* the devisee, and *not doubting*, if she has no relatives of her own, that she will consider my near relative, should she survive me."⁶ According to the modern cases, mere words of hope or expectation regarding

¹ Nunn v. O'Brien (Md., 1896), 34 Atl. R. 244; Mitchell v. Mitchell, 143 Ind. 113, 42 N. E. R. 465.

² Whelen's Estate, 34 Atl. R. 329, 175 Pa. St. 23; Clay v. Wood (N. Y.), 47 N. E. R. 274.

³ In re Hamilton, 2 Ch. 370, 12 Reports, 355; Harland v. Trigg, 1 Bro. C. C. 142.

⁴ Sale v. Moore, 1 Sim. 534.

⁵ In re Whitcom's Estate, 86 Cal. 265, 24 Pac. R. 1028; Shaw v. Lawless, 5 C. & F. 129; Meredith v. Henage, 1 Sim. 542.

⁶ Sale v. Moore, 1 Sim. 534; Reeves v. Baker, 18 Beav. 373. In Colton v. Colton, 127 U. S. 300, 8 Sup. Ct. R. 1164, the testator, giving his entire estate to his wife, "*recommended* to

her his mother and sister, and *requested* her to make such provision for them as *in her judgment might be best.*" The court held that a trust was created, and that the request and recommendation were mandatory, taking into consideration the facts that the mother of the testator was an invalid of advanced age, requiring constant care, nursing and medical attendance, and the sister dependent upon her. The discretion of the widow, if any, was limited to the extent of the provision, and the court did not hesitate to receive evidence of the necessitous circumstances of the beneficiaries, and to consider them in determining whether a trust was created.

the disposition which a legatee is to make of property given him absolutely do not create a trust.¹ Thus, it has been held that an expression of a *desire and hope*,² or of a *hope* coupled with a *belief*³ that a legatee will bestow a part of his legacy on another, does not create a trust.⁴ So, where the testator stated that he *expected* and desired,⁵ that he *desired and requested*,⁶ or that he *wished*, a legatee to make a particular disposition of the legacy, no trust was created. Thus, a bequest in terms absolute to two persons, followed by the words: "And I *wish* them to bequeath the same equally between the families of my nephew O and my dear niece P. in such mode as they shall consider right," does not confer merely an interest for life with a precatory trust added, but an absolute fee simple.⁷ So, also, the expression of a wish that a devisee, to whom the estate is given absolutely, shall so arrange his affairs at his death that whatever shall remain shall go to the son of the testator, is precatory, and does not create a trust in favor of said son.⁸

It is useless to multiply examples. Each will must be construed according to its peculiar phraseology. The only general rule which it is safe to enunciate is that, where a gift is

¹ Spooner v. Lovejoy, 108 Mass. 529, 533; Hill v. Page (Tenn.), 36 S. W. R. 735; Hart v. Allen (Mass., 1897), 44 N. E. R. 116; Aldrich v. Aldrich (Mass., 1898), 51 N. E. R. 449; Whiting v. Whiting, 4 Gray (Mass.), 236, 240; Cole v. Littlefield, 35 Me. 439; Kinter v. Jacobs, 43 Pa. St. 445; Pennock's Estate, 20 Pa. St. 268, 274, 282.

² Hess v. Singler, 114 Mass. 56, 59; Bills v. Bills, 80 Iowa, 269, 45 N. W. R. 748. Cf. Harland v. Trigg, 1 Bro. C. C. 142. A devise of "all the rest and residue of my property . . . to my dear wife, . . . believing that she will manage it judiciously, and perfectly satisfied that she will make a fair distribution of it among our children at her death," conveys an absolute title to the residue of the real estate, the words not being precatory in their nature. Cheston v. Cheston, 43 Atl. R. 768.

³ Van Duyne v. Van Duyne, 15 N. J.

Eq. (1863), 397, 503; Lechmere v. Lavie, 2 My. & K. 197.

⁴ And a devise in fee to persons who are by the testator "*admonished and charged* that the gift was made" in the *hope* and *upon the trust* that they should care for their parents during their lives, is not in trust. Arnold v. Arnold, 41 S. C. 291, 19 S. E. R. 670. The court here deliberately rejected the words "in trust."

⁵ In re Gardner, 35 N. E. R. 439, 140 N. Y. 122.

⁶ Clark v. Hill (Tenn.), 39 S. W. R. 339; Bacon v. Ransom, 139 Mass. 117, 29 N. E. R. 473; Bryan v. Milby, 6 Del. Ch. 208, 24 Atl. R. 333; Enders v. Tesco, 11 S. W. R. 818; Negroes v. Plummer, 17 Md. 165.

⁷ In re Hamilton, 2 Ch. 370 (1895), 12 Reports, 355; Trench v. Hamilton, id.

⁸ Nunn v. O'Brien (Md., 1896), 34 Atl. R. 344.

bestowed in *absolute* terms, and the use, employment or disposition of the property is left to the discretion of the legatee, so that he may consume or expend the whole for his own benefit, no trust is created by the language of the testator recommending, exhorting, desiring or entreating him to give a part to another.¹ If the conferring of the pecuniary benefit is relegated to the discretion or good judgment of the legatee, or if he may do "*as he thinks proper*,"² or prudent,³ as he "*may think just and right*,"⁴ as "*he may think best*,"⁵ or "*may see fit*,"⁶ or as her *sense of justice and Christian duty shall dictate*,⁷ and, *a fortiori*, if the testator directs that the legatee is to be under no legal responsibility to any court or person for the use of the money,⁸ he takes an absolute title unfettered by any trust, although the strongest words of desire, suggestion or recommendation have been used.⁹

¹ *Ellis v. Ellis*, 15 Ga. 296; *Cockrill v. Armstrong*, 31 Ark. 580; *In re Whitcom's Estate*, 86 Cal. 265, 24 Pac. R. 1028; *Hunt v. Hunt*, 50 Pac. R. 578; *Dexter v. Evans*, 63 Conn. 58, 27 Atl. R. 308; *Heard v. Sill*, 26 Ga. 312; *Jones v. Jones*, 124 Ill. 254; *Bulfer v. Willigrod*, 71 Iowa, 620, 33 N. W. R. 136; *Fullenwider v. Watson*, 113 Ind. 18, 14 N. W. R. 571; *Collins v. Carlisle*, 7 B. Mon. (Ky.) 14; *Webster v. Wathen*, 97 Ky. 318, 30 S. W. R. 663; *Hall v. Otis*, 71 Me. 326, 330; *Morse v. Morrell*, 82 Me. 80, 84, 19 Atl. R. 97; *Taylor v. Brown*, 88 Me. 56, 59; *Sturgis v. Paine*, 146 Mass. 354, 16 N. E. R. 21; *Aldrich v. Aldrich* (Mass., 1898), 51 N. E. R. 449; *Bacon v. Ransom*, 139 Mass. 117, 29 N. E. R. 473; *Lucas v. Lockhart*, 10 Smedes & M. (Miss.) 466; *Hunt v. Hunt*, 11 Nev. 442; *Forster v. Winfield*, 23 N. Y. S. 169, 3 Misc. Rep. 435; *Dominick v. Sayres*, 3 Sandf. (N. Y.) 559; *Rose v. Hatch*, 125 N. Y. 427, 26 N. E. R. 467; *Brunson v. King*, 2 Hill Eq. (S. C.) 483, 490; *Rowland v. Rowland*, 29 S. C. 54, 6 S. E. R. 902; *Thompson v. McKissick*, 3 Humph. (Tenn.) 631; *Tabor v. Tabor*, 85 Wis. 313, 316; *Knox v. Knox*, 59 Wis. 172, 175; *Toms*

v. Owen, 52 Fed. R. 417; *Hoy v. Master*, 6 Sim. 568; *Scott v. Key*, 35 Beav. 291; *M'Cornish v. Grogan*, 1 L. R. 313; *Finden v. Stevens*, 2 Phil. 142; *Knott v. Cottee*, 2 Phil. 192; *Brook v. Brook*, 3 Smale & Gif. 280; *Meredith v. He neage*, 1 Sim. 542; *Shepperd v. Nottage*, 2 J. & H. 766; *Foster v. Elshey*, L. R. 19 Ch. D. 518; *Johnston v. Rowland*, 2 De Gex & Sm. 356; *Williams v. Williams*, 1 Sim. (N. S.) 358, 372; *Cole v. Hawes*, L. R. 4 Ch. D. 238; *Wood v. Cox*, 1 Keen. 317.

² *Weiler v. O'Brien*, 23 N. Y. 366.

³ *Rowland v. Rowland*, 29 S. C. 54, 6 S. E. R. 902.

⁴ *Boyle v. Boyle*, 152 Pa. St. 108, 31 W. N. C. 453, 25 Atl. R. 494.

⁵ *Bulfer v. Willigrod*, 71 Iowa, 620, 33 N. W. R. 136.

⁶ *Dexter v. Evans*, 63 Conn. 58, 27 Atl. R. 308.

⁷ *Lawrence v. Cooke*, 104 N. Y. 632, 11 N. E. R. 144.

⁸ *Bacon v. Ransom*, 139 Mass. 117, 29 N. E. R. 473; *Biddle's Appeal*, 80 Pa. St. 258.

⁹ *Eaton v. Watts*, L. R. 4 Eq. 151; *Young v. Martin*, 2 Y. & C. C. C. 582; *Lambe v. Eames*, L. R. 10 Eq. 267; *Stead v. Mellor*, L. R. 5 Ch. D. 225;

§ 797. **Precatory words in a devise to a person for himself and children.**— Gifts to the widow or child of the testator or to a stranger, conferring, by express language, an absolute title, but containing an expression of hope, confidence, assurance or desire that the devisee will expend a portion in the support or education of his or her children, are usually construed to give the parent an absolute fee and to create no trust in him which the children can enforce. The dispositive language of the testator, so far as it refers to the children, is intended solely to show the purpose and motive of the gift to the mother or father.¹ But some English cases have construed a gift to A. for the benefit of himself and children as creating a trust in A. for his children,² or a life estate in him and a power of appointment by will in favor of the children. Everything depends upon the pre-

Barrett v. Marsh, 126 Mass. 213, 215; Randall v. Randall, 135 Ill. 398, 26 N. E. R. 780, where an absolute legacy was given to the husband of the testatrix to provide for the support of their children, and from time to time to be advanced to them as they may need, but with *full power to control the same as his absolute property* without being required to file or render any account whatever. Thus, "I expect and desire that my wife, to whom the property was given absolutely," will not dispose of any of said estate by will so that it shall go out of my family and blood relations, does not create a trust. In re Gardner, 35 N. E. R. 439, 140 N. Y. 122. A power of appointment is not created by a devise of property to be at the sole disposal of the devisee, "but trusting that, should she not marry and have other children, her affection to our joint children will induce her to make our said daughter her principal heir." Hoy v. Master, 6 Sim. 568.

¹Smith v. Wildman, 39 Conn. 387; Allen v. McFarland, 150 Ill. 455, 37 N. E. R. 1006; Bryan v. Howland, 98 Ill. 625; Zimmer v. Sennott, 134 Ill. 505, 25 N. E. R. 774; Sale v. Thornsbury, 86 Ky. 266, 5 S. E. R. 568; Blouin

v. Phaneuf, 81 Me. 176, 181, 16 Atl. R. 540; Cole v. Littlefield, 35 Me. 439, 445; Aldrich v. Aldrich (Mass., 1898), 51 N. E. R. 449; Chase v. Chase, 5 Allen (Mass.), 101; Taft v. Taft, 130 Mass. 461; Whiting v. Whiting, 4 Gray (Mass.), 236, 240; Elkinton v. Elkinton (N. J. Eq.), 18 Atl. R. 587; Pratt v. Miller, 23 Neb. 496; Holder v. Holder, 59 N. Y. S. 204, 40 App. Div. 255; McIntyre v. McIntyre, 123 Pa. St. 323, 16 Atl. R. 783; Boyle v. Boyle, 152 Pa. St. 108, 25 Atl. R. 494; Paisley's Appeal, 70 Pa. St. 153, 158; Biddle's Appeal, 80 Pa. St. 258; Hippenstall's Appeal, 144 Pa. St. 259; Thompson v. McKissick, 3 Humph. 631; Rhett v. Mason, 18 Gratt. (Va.) 541; In re Adams, L. R. 24 Ch. D. 199; Webb v. Wools, 2 Sim. (N. S.) 267; In re Adams and Kensington, L. R. 27 Ch. D. 394; Howarth v. Dewell, 29 Beav. 18; Scott v. Key, 35 Beav. 291; Greene v. Greene, 3 L. R. 90; Pushman v. Filliter, 3 Ves. 7; Lambe v. Eames, L. R. 6 Ch. 597; Atkinson v. Atkinson, 62 Law Times, 733; Paul v. Compton, 8 Ves. 380; Cruwys v. Coleman, 9 Ves. 319; Carr v. Living, 28 Beav. 644.

²Bird v. Maybury, 83 Beav. 351; Longmore v. Elcome, 34 Beav. 536; Berry v. Briant, 2 Drew. & Sm. 1.

cise language of the will. Thus, the fact that the mother is directed in precatory words to devise what remains among her children,¹ is given a power to do so,² or that either by deed or will she may appoint certain sums to the children who behave themselves to her satisfaction,³ will not create a trust for the children, where the parent is given an absolute title and the disposition of the property is left to her discretion. So, too, where the testator gives property to her husband "hoping he would leave it to his sons if the latter was worthy," but giving the father full discretion, no trust is created, as the words of hope are qualified by language which gives the parent a full discretion as to the disposition of the property.⁴ And a devise of all the land of the testator to his wife, "to have and to hold in fee simple," followed by an expression of trust and confidence that the wife would provide by last will for equitable distribution among their children, with a further provision that "this expression of trust and confidence is not to be interpreted as limiting her right of ownership or power of distribution," creates no trust, but gives the wife an estate in fee simple.⁵

§ 798. Powers of appointment defined and classified.—It will be impossible, owing to the limited space which is at our disposal, to give any but the most concise treatment of the subject of testamentary powers of disposition and selection. In the first place, it may be said powers of appointment assimilate in their character very closely to trust estates, so that many of the rules elsewhere discussed, relating to trusts, may also be applied to powers.⁶ All estates in land which are created by the execution of powers owe their validity either to the statute of uses or to that of wills.

Powers owe their origin to equity, where they were permitted to be created in two ways. *First.* They might be created by a deed, in which case the power which was created was valid only if it would be valid as a use under the statute of uses. *Second.* They might be created by will. The donee of the power created by the will might then execute it by his deed or will. An example of a power to be exercised by will would

¹ *Grierson v. Kirsop*, 2 Keen. 633.

⁵ *Tabor v. Tabor*, 55 N. W. R. 702,

² *Howorth v. Dewell*, 29 Beav. 18. 85 Wis. 313.

³ *Le Froy v. Flood*, 1 Ir. Ch. 1.

⁶ See *ante*, § 782 et seq.

⁴ *Eaton v. Watts*, L. R. 4 Eq. 151.

be a devise to A. of an estate for life, with a power in A. to divide the estate among his children by his will. This is a special power in A., and operates as a future use until A.'s death, when the legal title vests in the children either under his will by appointment, or in default of an appointment it vests in the children of A. under the original instrument creating the power. An example of a power created by will to be exercised by deed would be a power of sale conferred upon an executor.

By the employment of powers a testator is enabled to create executory estates to begin in the distant future, when, in the *judgment of the donee*, they can be most advantageously created. The interest of the persons named who are in the end to benefit by the appointment, *if the power is special*, is a contingent use or an executory devise until, by the appointment, the legal estate becomes vested in them. This equitable interest they take under the original instrument by which the power is created, and not by the appointing instrument. The elasticity of powers and their great convenience in family settlements of property recommended them to the attention of the English chancellors. In course of time, as a result of the continuous exposition of the subject, a system of intricate rules regulating powers was established, and the more extensively powers were employed the more abstruse and complex became the rules by which they were governed.

The persons who are concerned in the creation and the execution of the power are the *donor*, who confers or creates it; the *donee*, who is the person upon whom it is conferred, and who, as regards its execution, is called the appointor; and the *appointee*, who is the person for whose benefit the power is to be exercised, and who may take in default of an appointment. Powers may be classified according to the character of the appointees into *general* powers and *special* powers. A *general power* is one which may be exercised by the donee in favor of any person or class of persons whom he may choose. The donee under a general power may appoint to any person or class of persons he pleases. A *special power* is one which can be exercised only in favor of particular persons or classes of persons, usually indicated by the donor.¹

¹See *post*, § 803; 2 Washburn, R. P., p. 641; Co. Lit. 271b; Williams on Real Property, p. 309.

Powers may also be divided, as regards the character of the interest which they create or which they revoke, into powers *appendant* or *appurtenant*, by the exercise of which the donee creates an estate which attaches to or modifies his own interest in the land, as a power to grant leases which is attached to a life estate. Here the lease which is made takes effect, not only in derogation of the life tenant's estate, but may bind the remainderman where the lease does not expire during the existence of the life tenancy.¹ Powers *collateral en gross* are those by which the donee creates an interest in land in another person which does not attach to or diminish his own interest in the land. The creation of the estate by the power, though the donee has an interest, does not affect that interest in any way. The estate which is created by the power is usually to be taken out of the interest of some other person in the property after the estate of the donee has ceased. Examples of these powers *in gross* are powers conferred upon a life tenant to devise the fee in remainder, or to grant leases which are to begin at his death, or to raise an estate in jointure for himself for life, then to his widow for her life, remainder over.² Powers simply collateral are those conferred upon a person who has no other interest in or title to the land except the power. All the donee has is a right to appoint the estate, the legal title to which is in others. An example of such a power is a power of sale in the executor, enabling him to dispose of land to pay debts or to divide.³

¹ Williams on R. P., p. 310; 2 Wash. on Real Prop., pp. 639, 640.

² 1 Sugden on Powers, 114; 4 Cruise's Digest, 220; 2 Washburn, R. Prop. 641; Gorin v. Gordon, 38 Miss. 214; Wilson v. Troup, 2 Cow. (N. Y.) 236.

³ *Ante*, § 782.

The following classification of powers may be found of value:

I. Powers simply collateral; *i. e.*, powers given to a person who has no interest whatever in the property over which the power is given; *e. g.*, where executors have a power to sell or to mortgage land.

II. A power *in gross*; *i. e.*, a power

given to a person who has an interest in the property over which the power extended, but which is such an interest as cannot be affected by the exercise of the power. The most familiar instance of such a power is that of a tenant for life with a power of appointment by will, to take effect after his death.

III. A power *appendant* or *appurtenant*; *i. e.*, a power exercisable by a person who has an interest in the property, which interest is capable of being affected, diminished, or disposed of to some extent by the exercise of the power; *e. g.*, power of a tenant for life to grant leases. In re

§ 799. Language necessary to be used to create a power.—No formal language is required to create a power. Any words which clearly show the intention of the testator to create the power, and which are definite enough to show its nature, the donee and its objects, are sufficient. The court must seek the intention of the testator who has conferred the power, and this, when ascertained, must be carried out in a liberal and equitable manner. Great latitude of language is allowed to a testator in the creation of testamentary powers. For this reason it is often very difficult to determine whether the testator has given an estate in the land, or only a naked power with the legal title in some one else.¹ This question most frequently arises where land is to be sold for some testamentary purpose, as to pay debts or to distribute the proceeds. If from all the will it is apparent that the testator has devised the legal estate to the person who is to exercise the power, it is a power coupled with an interest, and is elsewhere explained.² But where the executor is only directed to sell, and the property itself is not disposed of or is given to others, all the executor has is a mere naked power.

§ 800. The mode of the execution of the power.—The donee of a testamentary power must execute it strictly in the mode indicated by the donor and according to the limitations and conditions he has imposed upon the donee.³ A power of appointment by will is not properly executed by an appointment by deed.⁴ And every deed or will executing a power should expressly declare the property disposed of, the authority of the person executing it, and the formalities, if any, required by the creator of the power.⁵ Under the statute of frauds an instrument in writing is always necessary to execute a power over real estate.⁶ And as the donor of the power has an ab-

D'Angibau, *Andrews v. Andrews*, L. R. 13 Ch. Div. 228.

¹ *Ante*, § 782.

² *Ante*, § 782.

³ 1 Sugden on Powers, 211, 250, 278; Williams on Real Property, 295.

⁴ There may be exceptions to this rule in equity. In *Tollet v. Tollet*, 2 P. Wms. 489, a man had a life estate with a power to make a jointure for

his wife by deed. He devised her an estate in jointure by will, and the chancellor sustained this as a valid execution of the power because the wife would not otherwise be provided for.

⁵ 4 Kent, p. 323.

⁶ *Perkins v. Presnell*, 100 N. C. 220, 6 S. E. R. 801.

solute right to prescribe any conditions by which its exercise should be attended, it is the rule at law, and independently of statute, that the execution of the power is not valid if the precise conditions mentioned are not complied with.¹ Where no particular formalities are required in the execution of the power, it may be executed by any writing sufficient under the statute to convey an interest in real property. Thus, in the absence of statute, a power of appointment by will may be executed by a writing *in the nature of a will*, though it is not executed according to the formalities which are required by the statute of wills.²

Generally, too, if there be a slight divergence from the directions of the donor, the aid of a court of equity may be invoked to cure the errors or omissions, particularly, if the power is special, and therefore in the nature of a trust estate in which others than the donee have an equitable interest. Where a deed in execution of a power of sale or a power to mortgage is invalid at law because of a lack of witnesses or a seal, or because of the omission of words of limitation, or for some other informality, a re-execution would be directed upon application to a court of equity.³ But a defective execution of a power by deed will be aided in equity, and omissions supplied only where it is clearly evident that an execution of the power was intended. If the instrument, by which the intention to execute a power is shown, is informal and inappropriate, its reformation into one that is formal and correct will be ordered. The distinction lies between a case where *an attempt is made to execute* the power, and the execution is in danger of failure be-

¹ *Hawkins v. Kemp*, 3 East, 410; *v. Wentworth*, 82 Md. 258, 33 Atl. R. 723; *Kearney v. Vaughan*, 50 Mo. 484; *Doe v. Peach*, 2 Maule & Sel. 576; *Wright v. Wakeford*, 17 Ves. 454; *Beatty v. Clark*, 20 Cal. 11; *Mutual*

² *Oliver v. Wentworth*, 82 Md. 258, 33 Atl. R. 723; *Heath v. Withington*, 6 Cush. (Mass.) 497, 500; *Newburyport Bank v. Stone*, 13 Pick. (Mass.) 433; *Osgood v. Breed*, 12 Mass. 525; *Porter v. Turner*, 3 S. & R. 108; *Deane v. Littlefield*, 1 Pick. (Mass.) 239. *Cf. Hatchett v. Hatchett*, 103 Ala. 536; *L. I. Co. v. Everett*, 40 N. J. Eq. 345; *Wright v. Railroad Co.*, 92 Hun, 32, 36 N. Y. S. 901; *Bradish v. Gibbs*, 3 Johns. Ch. (N. Y.) 528, 550; *Hout v. Hout*, 20 Ohio St. 119; *Porter v. Turner*, 3 S. & R. (Pa.) 108, 111, 114; *Hunt v. Rousmaniere*, 2 Mason, C. C. 251; *Piatt v. McCullough*, 1 McLean, C. C. 69; *Wade v. Paget*, 1 Bro. C. C. 368; *Cockerell v. Cholmeley*, 1 Russ. & My. 424. See *McConnell v. Day*, 61 Ark. 464, 33 S. W. R. 731.

³ *Hatchett v. Hatchett*, 103 Ala. 536; *Stewart v. Stokes*, 33 Ala. 494; *Terry v. Rohan*, 5 S. E. R. 38; *Oliver*

cause some formality has not been observed, and a case where no attempt whatever has been made to execute the power. There must be a distinct intention to execute the power. If this is not present, although equity may supply defects occasioned by mistake or inadvertence, it will not supply omissions intentionally made, or execute a power which the donee did not intend to execute.¹ In other words, the court of equity will not permit an attempted execution of a power to be defeated merely because of the inadvertent omission of a mere form; but if no attempt has been made to execute a power, no intention to exercise it can be presumed.² If the donee of a power of sale has also an interest in his own right, his deed purporting to convey the land, but making no reference to the power, will usually convey only his own interest. Thus, where land is devised by the testator to A. for life, with a power of sale of the fee, the proceeds to be invested or paid to third persons, a deed of conveyance executed by A. individually, making no reference to the existence of the power, will convey only such right and title to the land as A. owned absolutely.³ And a court of equity will not reform a deed executed by a devisee for life, having a power under a will to convey the fee for her support, where the deed makes no reference to the testamentary power of sale, and there is no evidence that it was intended as an execution of the power.⁴

If, however, it is clear from the circumstances that the deed, though not referring to the power itself or to the instrument which created it, was intended by the grantor not only to con-

¹ Garth v. Townsend, L. R. 7 Eq. 220.

² Jackson v. Jackson, 4 Bro. C. C. 462; Wilkes v. Holmes, 9 Mod. 485; Taylor v. Wheeler, 2 Vern. 564; Bixby v. Eley, 2 Bro. C. C. 325; Hervey v. Hervey, 1 Atk. 567, 568; Smith v. Baker, 1 Atk. 385; Shannon v. Bradstreet, 1 Sch. & Lef. 52, 63; Fothergill v. Fothergill, 2 Freem. 256; Kennard v. Kennard, L. R. 8 Ch. App. 572; Wilson v. Piggott, 2 Ves. Jr. 351; Garth v. Townsend, L. R. 7 Eq. 220; Kennard v. Kennard, L. R. 8 Ch. App. 227; Langslow v. Langslow, 21 Beav. 558; Vane v. Fletcher, 1 P. Wms. 354.

³ Smith v. McIntyre, 95 Fed. R. 585; New England Mortgage Co. v. Buice, 98 Ga. 795, 26 S. E. R. 84; Ridgely v. Cross, 83 Md. 161, 34 Atl. R. 469; Phillips v. Brown, 16 R. I. 612, 15 Atl. R. 90; Pease v. Gillette, 32 N. Y. Supp. 102, 10 Misc. R. 467; Grundy v. Hatfield, 16 R. I. 579, 18 Atl. R. 186; McCreary v. Bomberger, 151 Pa. St. 323, 31 W. N. C. 41; Payne v. Johnson (Ky.), 24 S. W. R. 238; Id., 609; Mutual L. Ins. Co. v. Shipman, 119 N. Y. 324, 24 N. E. R. 177.

⁴ Brown v. Phillips, 16 R. I. 612, 18 Atl. R. 249.

vey any interest he may have in the property, but as a valid execution of the power, the intention will be respected and the defective execution will be aided. But the intention to execute the power, if it does not appear in express terms upon the face of the instrument, must arise by very necessary implication.¹ Every conveyance executed by virtue of a power of sale should recite the power in explicit language, showing its origin and extent, and showing that the property or estate conveyed is conveyed in execution of the power.² All these facts ought to appear upon the face of the instrument.

But where an executor, trustee or other donee of a power has no interest in the property as an individual, a deed of conveyance, though not reciting the power nor the fact that he is an executor or a trustee, nor showing that it purports to be executed as carrying out the power, is valid.³

§ 801. The execution of a power of appointment by a general or residuary devise in a will.—In determining the question whether a power of appointment which is to be exercised by will is validly executed by a general or a residuary clause in a will, it is first necessary *to determine if the donee meant to execute it*. This must be ascertained solely from the language of the will. The intention to execute a power by will may be shown in three modes. 1st. Where there is an express reference to the power itself. 2d. Where the will expressly refers to the property over which the testator has a power of appointment. 3d. Where the provisions of the will executed by the donee of a power to devise would be nullified unless they are to be regarded as an execution of the power.⁴ An express reference to the power or to the property which is the subject of the power will usually be conclusive evidence of an intention to execute it.

But it is not always necessary that the intention to execute

¹ Henderson v. Smith, 10 C. C. A. 602, 62 Fed. R. 708; Mutual L. I. Co. v. Shipman, 24 N. E. R. 177, 119 N. Y. 324; Cotting v. Sartiges, 17 R. I. 668, 24 Atl. R. 530; Chase v. Ladd, 29 N. E. R. 637, 155 Mass. 417; Silvers v. Canary, 109 Ind. 267, 9 N. E. R. 904; Brown v. Farmers' Loan & T. Co., 121 N. Y. 302, 24 N. E. R. 602; Terry v. Rodohan, 79 Ga. 278, 5 S. E. R. 38; Hill v. Conrad (Tex., 1898), 43 S. W. R. 789.

² Johnson v. Johnson, 108 N. C. 619.

³ Terry v. Rodohan, 79 Ga. 278, 5 S. E. R. 38; Arlington State Bank v. Paulsen (Neb., 1899), 78 N. W. R. 303.

⁴ See remarks of Story, J., in Blagge v. Miles, 1 Story, C. C. 426.

a power to devise should appear by express language. But where an intention to execute a power is implied, the implication must be reasonably clear and manifest. If it is doubtful whether the will was executed to carry into effect the power, the doubt may nullify the alleged execution of the power.¹

But if upon the whole will it is apparent that the testator intended to execute a power of appointment of which he was the donee, a general or residuary devise will be sufficient, though there may be no reference in the will to the character or the existence of the power in question.²

Independently of statutes by which a will passes lands ac-

¹ We cannot do better in this place than to quote the remarks of Judge Story contained in *Blagge v. Miles*, 1 Story, C. C. 426, on page 446. "The authorities upon this subject may not all be easily reconciled. But the principle furnished by them, however occasionally misapplied, is never departed from, that if the donee of the power intends to execute it, and the mode be in other respects unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. I agree that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful, under all the circumstances, then the doubt will prevent the instrument from being an execution of the power. All the authorities agree that it is not necessary that the intention to execute a power should appear by express terms or recitals in the instrument. It is sufficient that it shall appear by words, acts or deeds demonstrating the intention."

² *Bullerick v. Wright* (Ind., 1898), 47 N. E. R. 981; *Payne v. Johnson*, 95 Ky. 175, 24 S. W. R. 238; *Richardson v. Woodbury*, 48 Me. 206; *Hassam v.*

Hazen, 156 Mass. 93, 94, 30 N. E. R. 469; *Cummings v. Bartlett*, 149 Mass. 243, 248; *Sewell v. Wilner*, 132 Mass. 134; *Durant v. Smith*, 159 Mass. 229, 233; *Kimball v. Bible Society*, 65 N. H. 139, 23 Atl. R. 83; *Emery v. Haven* (N. H., 1898), 35 Atl. R. 940; *Cooper v. Haines*, 70 Md. 282, 17 Atl. R. 79; *Den v. Crawford*, 3 Halst. (N. J. Eq.) 103; *White v. Hicks*, 33 N. Y. 892, 893; *Hutton v. Benkard*, 92 N. Y. 801, 803; *Bigelow v. Tilden*, 18 Misc. R. 689, 48 N. Y. S. 858; *Kibler v. Hover*, 10 N. Y. S. 375; *Austin v. Oakes*, 117 N. Y. 577, 28 N. E. R. 193; *Lockwood v. Mildeberger*, 53 N. E. R. 803, 159 N. Y. 181; *Jackson v. Delancey*, 13 Johns. (N. Y.) 537; *Johnston v. Knight*, 117 N. C. 122, 23 S. E. R. 92; *Drusadow v. Wilde*, 63 Pa. St. 170; *Howell's Estate* (Pa., 1898), 39 Atl. R. 966; *Hanna v. Ludwig*, 73 Tex. 37; *Machir v. Funk*, 90 Va. 284, 18 S. E. R. 197; *Blagge v. Miles*, 1 Story, C. C. 426, 466; *Lee v. Simpson*, 134 U. S. 572, 10 Sup. Ct. 631; *Doe v. Roake*, 2 Bing. 497; *Wildbore v. Gregory*, L. R. 12 Eq. 482; *Carte v. Carte*, 3 Atk. 174; *Stillman v. Weedon*, 16 Sim. 26; *Patch v. Shore*, 2 Dr. & Sm. 598; *Hodsden v. Dancer*, 16 W. R. 1101; *Palmer v. Newell*, 20 Beav. 38; *In re Merritt*, 1 Sw. & Tris. 112. *Contra*, *Miner v. Gambrill*, 71 Md. 80, 18 Atl. R. 481; *Matteson v. Goddard*, 17 R. L. 299, 21 Atl. R. 914; *Har-*

quired after its execution, if the testator, at the time of the execution of his will, had no lands except *those over which he had a power* of appointment, upon which the general devise could operate, it would execute the power, as he *could not be presumed to have after-acquired land in mind*. If there is land upon which the general devise can operate, the *prima facie* presumption is that it shall operate on that, and it will require some evidence of an intention, though usually slight evidence is sufficient, that the testator meant the general devise to operate in execution of the power.¹ The statute by which it is enacted that a will shall be construed to take effect as though made immediately before the death of the testator is applicable to powers. So, if a general or residuary devise is enough to execute a power of appointment which was in existence when the will was made, it may be sufficient also to execute a power which was created and conferred upon the testator after the execution of the will, which purports to be an execution of it.²

§ 802. Equitable remedies for the non-execution of powers.

A mandatory power, or one whose execution is obligatory upon the donee, is regarded in equity as a trust. A general power will not be executed. If the donor in creating a special power confers an uncontrollable discretion to exercise it or not on the donee as he sees proper, equity will not interfere in case the donee dies without executing it.³ But a mandatory power which must be exercised in any event is differently regarded. It is regarded as a power in trust. And the remedy in equity for the non-execution of a mandatory power which is equivalent to a power in trust is the same as for the enforcement of a trust. The execution of a power in which third persons are interested will be compelled in equity. And equity will not permit the negligence of the donee of such a power, his mistaken understanding of his duties, or his accidental failure to

vard Col. v. Balch, 171 Ill. 444, 49 N. E. R. 543; Pease v. Pilot Knob, etc. Co., 49 Mo. 124.

¹ Doe d. Caldecott v. Johnson, 7 M. & Gr. 1047; Clere's Case, 6 Co. 176; Ex parte Caswall, 1 Atk. 559; Hoste v. Blackman, 6 Mad. 190; Sugden on Powers, 432; 4 Cruise, 212; Coke Litt., 271 B.

² Carte v. Carte, 3 Atk. 174; Colfield v. Pollard, 3 Jur. (N. S.) 1203; Hodsdon v. Dancer, 16 W. R. 1101; W. N. 1868, p. 22. *Contra*, Lepley v. Smith, 18 Ohio Cir. Ct. R. 189.

³ In re Eddowes, 1 Dr. & Sm. 395. See *ante*, p. 624.

execute the power, to prejudice those who are to benefit by its exercise. The power will be regarded as a trust, and in case the donee has not performed his duty the court will perform it for him in order that the rights of the beneficiaries may be protected. And though the donor of the power has not made an express gift of the property to the objects of the power in default of an appointment, a gift to them will be implied under the presumption that the donor did not intend that the beneficiaries should be disappointed by the neglect or caprice of the donee.¹ In case of the death of the donee,² or his incompetency before he has executed the power, another person will be appointed by the court to act for the donee.³ The execution of the power by the court in the case of the death of the donee will be retrospective as of the date at which it ought to have been originally executed.

The sole object of the court in executing a power in trust which is contained in a will should be to carry out the intentions of the testator. If the testator has laid down one or more rules for the guidance of the donee or trustee which the latter has not followed, the court will follow these rules. Accordingly, if the donor has indicated the manner in which he wished the donee to act, the objects who are to benefit by the execution of the power and the proportions in which they are to take, and has given directions for the guidance of the donee which limit and control his execution of the power, the power can be executed by the court as well as by the donee.⁴ Thus, in a case where trustees were directed to distribute a fund among "the friends and relations of the donor where they should see most necessity and as they should consider most just and equitable," the court took it upon itself to act, where the trustees refused

¹ See cases cited *ante*, § 469.

² *Harding v. Glyn*, 1 Atk. (1705), 469.

³ *Doyley v. Attorney-General*, 4 Vin. Abr. 485, pl. 16, 2 Eq. Cases Abr. 194, pl. 15; *Caplin's Will*, 43 L. J. (N. S.) 578; *Pierson v. Garnett*, 2 Bro. C. C. 38, 45; *Wards v. Groves*, 2 De Gex, F. & J. 210; *Izod v. Izod*, 32 Beav. 242. And see cases cited under §§ 792-795. See also *Cruwys v. Coleman*, 9 Ves. 319; *Walsh v. Wallinger*, 2 Russ. & My. 78; *Fordyce v. Bridges*, 10 Beav.

90; *Reid v. Reid*, 25 Beav. 469; *Hewet v. Hewet*, 2 Eden, 332.

⁴ *Peter v. Beverly*, 10 Peters (U. S.), 564; *Blake v. Hawkins*, 98 U. S. 315, 326; *Warner v. Long Island Co.*, 109 U. S. 355, 357; *Barker v. Reilly*, 4 Del. Ch. 80; *Gibbs v. Marsh*, 2 Met. (Mass.) 243, 252; *In re Croft*, 162 Mass. 22; *Osgood v. Franklyn*, 2 Johns. Ch. (N. Y.) 19; *Stewart v. Keating*, 36 N. Y. S. 913, 15 Misc. R. 44.

to act. The word "friends" was construed to be equivalent to "relations," and the case was referred to the master to ascertain how the trust fund might be most equitably and justly divided.¹ For, where the donor points out the persons who are to be the objects of the power, even though they are merely designated as members of an indefinitely defined class, and indicates to what extent they are to be benefited, the court will find no difficulty in ascertaining the precise intentions of the donor.² Where the donor points out the persons who are to be the appointees of the power and to what extent they are to be benefited, the court will have no difficulty in ascertaining the precise intentions of the donor, and if the donee dies without having executed the power in trust, the court of equity will by implication, under the maxim which assumes that to have been done which ought to have been done, raise a gift in default of appointment among those persons who were to have been the objects of the power.³ For the intention of the donor

¹Gower v. Mainwaring, 2 Ves. 87. In this case Lord Chancellor Hardwicke said: "What differs this from the cases mentioned is this: that there is a rule laid down for the trust. Wherever there is a trust or power (and this is a mixture of both), whether arising on a legal estate or reserved to be exercised by trustees according to their discretion, I do not know the court can put themselves in the place of those trustees to exercise that discretion. Where trustees have power to distribute *generally without any object pointed out or rule laid down*, the court interposes not, unless in case of a charity, which is different, the court exercising a discretion as having the general government and regulation of charity. But here *is a rule laid down* (and the word 'friends' is synonymous with 'relations,' otherwise it is absurd). *The trustees are to judge of the necessity and occasion of the family, the court can judge of such necessity of the family. That is a judgment to be made on facts existing, so that the court can make the*

judgment as well as the trustees, and when informed by evidence of the necessity can judge what is equitable and just in this necessity." This case has certainly carried the power of equity to exercise a discretionary power very far.

²"Where there appears a general intention in favor of the individuals of a class to be selected by another person, and the particular intention fails from that selection not being made, the court will carry into effect the general intention in favor of the class. Where such an intention appears, the case arises of the power being so given as to make it the duty of the donee to execute it; and, in such case, the court will not permit the objects of the power to suffer by the negligence of the donee, but fastens upon the property a trust for their benefit." Burrough v. Philcox, 5 My. & Cr. 72; Sugden on Powers, pp. 341-421.

³Fenwick v. Greenwall, 10 Beav. 412; Reid v. Reid, 25 Beav. 469; Woodcock v. Rennock, 4 Beav. 190; Jeffrey's Trusts, L. R. 14 Eq. 136; Derse

of the power governs the construction of testamentary powers, and in furtherance of this the courts will vary the form of executing the power, and, as the case may require, either enlarge what is apparently a limited power to a general power, or cut down a power to serve a particular purpose.¹

And if, on all the circumstances, it is the intention of the testator that a gift by implication shall be given to the objects of the power in default of an appointment, and the testator has not indicated how much each one of the objects is to take, equity will direct an equal division among all the appointees under the equity rule that equality is equity.² This would be the case where a distribution was directed to be made by the donee among a class of persons, each of whom was to receive a share in proportion to his worth or necessity.³

A distinction is made, in the event of a total *failure* to exercise a power, between the case of an *out and out gift to a class of persons with a power in some third person* to appoint in what proportion each member of the class shall take, and a mere direction to the donee of a power to appoint by his will the property given to him among the class. In the former case, where the donee fails or neglects to execute the power, and there is no disposition of the property to strangers in default of an appointment, the gift is regarded as a vested gift to the members of the class who are *living at the death of the testator*, subject to being divested or diminished by the subsequent execution of the power by the donee, and upon a total default of an appointment the fund will be equally divided among all

v. Derse, 79 N. W. R. 44; *Cox v. Wills*, 49 N. J. Eq. 130, 22 Atl. R. 794; *Smith v. Floyd*, 140 N. Y. 337, 35 N. E. R. 606; *Brierly v. Brierly*, 12 Rep. 151; *McCamant v. Nuckolls*, 85 Va. 331, 12 S. E. R. 160. This is the rule by statute in some states where an imperative trust is created for the benefit of a class which the donee neglects to execute. In *re Jones*, 84 Wis. 465, 54 N. W. R. 917.

¹ 4 Kent, Com., p. 339; Sugden on Powers, pp. 452, 453.

² *Doyley v. Attorney-General*, 2 Eq.

Ca. Ab. 146; *Salisbury v. Denton*, 3 K. & J. 529, 538; *Power v. Quely*, L. R. 4 Ir. 20; *Fenwick v. Greenwall*, 10 Beav. 412. See cases *ante*, p. 623.

³ In one or two of the states of the Union it is provided by statute that if the trustee of a power with the right of selection shall die leaving the power unexecuted, its execution shall be adjudged for the benefit of all persons designated as the objects of the power to take equally. *Derse v. Derse* (Minn., 1898), 79 N. W. R. 44.

members of the class who were living at the death of the testator.¹

But where there is no gift in express terms in the will to the class directly, but only a power of appointment is created directing the donee to divide by will property among the class, only those persons are objects of the power and take in default of an appointment who survive the donee when his will becomes effective at his death.² In the latter case the court will imply an intention to give the property, on a default of an appointment, to those persons only among *whom the donee might have distributed the property*, and on the failure or the neglect of the donee to exercise the power it will be exercised accordingly among those persons. Where property is given to A. for life, with a power in him to devise the same to his children, but no express devise to the latter, nor any devise to them or strangers in default of an appointment, the court will execute the power among a class composed of A.'s children living at his death, and not among the children of A. living at the death of the donor of the power. The class will be ascertained and the power executed by the court upon a default in its execution by the donee as of the date of his death, excluding from its operation all persons who, though they would have been members of the class had they survived, have died before the donee.³

The rules just stated are confined to mandatory powers or powers in trust. Where not only the time and manner of exercising the power are left to the donee, but *also the determination of the question whether the power shall be exercised at all* is relegated to the uncontrolled discretion of the donee, equity will not interfere. Where *this* is left to the uncontrollable discretion of the donee or trustee, equity will not attempt to control that which the donor intended should remain uncontrolled. If, then, the donee is vested with an absolute discre-

¹ Stewart v. Keating, 15 Misc. R. 44, 36 N. Y. S. 913. Cf. Doe v. Martin, 4 T. R. 39; Cunningham v. Martin, 1 Ves. 174.

² Meldun v. Devlin, 20 Misc. R. 56, 45 N. Y. S. 833; Walsh v. Wallinger, 2 Russ. & My. 78; Kennedy v. Kings-

ton, 2 Jac. & W. 431; Lambert v. Thwaites, L. R. 2 Eq. 151.

³ Doyley v. Attorney-General, 2 Eq. Ca. Ab. 194; Witts v. Bodington, 3 Bro. C. C. 95; Cruwys v. Coleman, 9 Ves. 319, 325; Birch v. Wade, 3 Ves. & B. 95; Finch v. Hollingsworth, 21 Beav. 112.

tion not only as to the manner of exercising the power, but to choose whether he shall or shall not exercise it at all, equity will not, in the absence of bad faith on his part, compel him to exercise it.¹ This rule is applicable to the execution of a discretionary power of sale,² or to a power to alter investments,³ or to divide property among persons nominated by the donee, or to apply income to a particular purpose in such amounts as may be suggested by the best judgment of the trustee.⁴

So where a donee of a power or a trustee has an uncontrollable discretion to apply any or all of the trust property to the support of a beneficiary, equity will not interpose where the donee has exercised the power honestly and in good faith.⁵ Where the trustee has *no discretion as to the amount which is to be applied* to the support of the beneficiary, and the discretion is unlimited only so far as the mode and the time of the pay-

¹ Mitchell v. Denson, 29 Ala. 327; Wilkinson v. Getty, 13 Iowa, 157; Hughes v. Washington, 72 Ill. 84; Lambert v. Harvey, 100 Ill. 338; Van Brocklin's Estate, 74 Iowa, 412, 38 N. W. R. 119; Howard v. Carpenter, 11 Md. 259; Venable v. Trust Co., 74 Md. 187, 21 Atl. R. 704; Greenough v. Wells, 10 Cush. (Mass.) 571, 577; Eldredge v. Heard, 106 Mass. 579, 592; Olney v. Balch, 154 Mass. 818, 322; Gibbs v. Marsh, 2 Met. (Mass.) 243, 252; Battelle v. Parks, 2 Mich. 531, 585; King v. Merritt, 67 Mich. 194. A testator devised to his wife all his property for her natural life, with full power and authority to devise and bequeath the same, by will, to such of his sons as shall be kindest to her, but such will not to become operative until after her death. *Held*, that she had absolute power to devise or convey the property to some or all of his sons. Watson v. Watson, 51 S. W. R. 1105. See also sustaining text, Merritt v. Corties, 71 Hun, 612, 24 N. Y. S. 561; Lindo v. Murray, 36 N. Y. S. 831, 91 Hun, 335; Hillen v. Iselin, 144 N. Y. 365; In re Fargo's Estate, 45 N. Y. S. 732; Righter v. Riley (W. Va., 1897), 27 S. E. R. 357;

Dillard v. Dillard (Va., 1896), 21 S. E. R. 669.

² Tempest v. Lord Camoys, L. R. 21 Ch. D. 571.

³ Brown v. Brown, L. R. 29 Ch. D. 889.

⁴ See also Pink v. De Thuissey, 2 Mad. 157; Tabor v. Brooks, L. R. 10 Ch. D. 273; Marquis v. Murray, L. R. 16 Ch. D. 161; Brown v. Higgs, 5 Ves. 501; White v. Crane, 18 Beav. 571; Hart v. Tribe, 19 Beav. 149; French v. Davidson, 3 Mad. 396; Costabadie v. Costabadie, 6 Hare, 410.

⁵ In re Balke, L. R. 29 Ch. D. 921; Tabor v. Brooks, L. R. 10 Ch. D. 372; Tiffany v. Monroe (R. I., 1897), 35 Atl. R. 302; Reid v. Patterson, 44 N. J. Eq. 211. Where one conveys property in trust, to be held for the benefit of such "charitable corporations" as he may appoint by will, a testamentary direction to his executor, an individual, to expend a certain sum in providing free excursions for poor children is valid, and the executor may give the money to a charitable corporation to be so expended. Loring v. Wilson (Mass.), 54 N. E. R. 502; Loring v. Blair, *id.* And *ante*, § 796.

ment of the income is concerned, equity will exercise its power to procure a strict performance of the trust.¹ And the court may institute an inquiry as to how much is needed for the carrying out of the trust,² or the income of the trust fund may be equally divided among the beneficiaries.³

§ 803. The fraudulent and improper and excessive execution of powers.—A general power of appointment by will enables the donee to devise the property to any person who may have the capacity to take.⁴ Under a special power to appoint by will, the donee is limited to the objects or class pointed out by the donor.⁵ If his selection is discretionary, he must make it within the range of those persons who are objects of the special power. He cannot set his opinion against that of the creator of the power and give to others whom he may think are more worthy. Thus, a power to appoint among children as a class is not validly exercised by an appointment among grandchildren.⁶ But a power to appoint among issue is well executed by a devise to issue of any degree of relationship.⁷ In general, it may be said that the donee of a power must act in the most perfect good faith, and with the sole object of carrying out the purpose and intention of the creator of the power.⁸ The donee of a power must not exercise it for a corrupt purpose, either by will or by deed. The donee will not

¹ In re Weaver, L. R. 21 Ch. D. 615.

² Maberly v. Turton, 14 Ves. 499.

³ Equity will interfere to enjoin a sale of land which is not conducted by the executor in accordance with the directions of the testator, on the application of legatees whose interests will suffer by reason of the mode in which the sale is being conducted. Napier v. Napier, 89 Ga. 48, 14 S. E. R. 870.

⁴ 4 Kent, 322; Hicks v. Ward, 107 N. C. 392.

⁵ Huber v. Free, 12 Ohio Cir. Ct. R. 833; Austin v. Oakes, 117 N. Y. 577, 23 N. E. R. 193; Schwartz's Estate, 168 Pa. St. 204, 31 Atl. R. 1085.

⁶ 2 Sugden on Powers, 253. See ante, § 547. A testator devised all his property to his wife "during her natural life, with power to sell and

dispose of the same in such manner as she may desire," "with power, also, to devise the same, at her death, to my children, or either of them, in such manner as she may deem best," and at her death the property remaining to go to the children. Held, that the wife could devise only to the children. Smith v. Hardesty, 41 Atl. R. (Md., 1898), 788.

⁷ Freeman v. Parsley, 3 Ves. 431; Crist v. Schamk, 146 Ind. 277, 282, 45 N. E. R. 190; Drake v. Drake, 82 N. E. R. 114, 134 N. Y. 220; ante, § 674; Cruse v. McKee, 2 Head (Tenn.), 1. Cf. Thorington v. Hall, 21 S. R. (Ala., 1897), 335.

⁸ Aleyn v. Belchier, 1 Eden (1758), 132; In re Huish's Charity, L. R. 10 Ch. 5.

be permitted to employ a discretion which he may possess in the execution of the power for his own benefit. If, to procure a benefit to himself, he shall attempt to execute his power fraudulently, his appointment will be set aside as invalid, and a court of equity will interpose for the purpose of setting *aside the fraudulent execution of a power* which is purely discretionary, where it would not compel the exercise of the discretionary power.¹ So, if the donee, who has a discretionary power to divide an estate among several persons, shall devise more to some than to others, in return for a consideration from those who are favored, the appointment being in fraud of the power will be void in equity and the fund will be equally divided among those who are the objects of the power.² The part which is tainted with fraud will be void *in toto* unless it shall be impossible to place all the parties to the power in their original position, or unless the person to whom the improper appointment has been made has parted with the property for a valuable consideration to a *bona fide* purchaser who is ignorant of the fraud.³

A special power of appointment by will, in such manner and with such limitations as the donee may select, is validly exercised by a devise in trust for the objects of the power,⁴ and by the gift of a contingent estate as well as by a vested estate.⁵ So a power of appointment over real estate in favor of children is well exercised by an appointment to trustees in trust for sale, and to hold the proceeds in trust for the objects of the power; and the trustees so appointed by the donee of the power will have the legal estate vested in them, and will be the proper persons to sell.⁶ Whether and how far an appointment is void,

¹ *Guion v. Smith*, 42 Miss. 77; *In re Vanderbilt*, 20 Hun (N. Y.), 520; *Williams' Appeal*, 73 Pa. St. 249; *Kerr v. Verner*, 66 Pa. St. 326; *Faloon v. Flannery* (Minn., 1898), 76 N. W. R. 954.

² *Degman v. Degman* (Ky., 1896), 84 S. W. R. 523; *Carver v. Richards*, 27 Beav. 488; *Reid v. Reid*, 25 Beav. 469; *Beddoes v. Pugh*, 26 Beav. 407, 411; *Daubeny v. Cockburn*, 1 Mer. 626.

³ *McQueen v. Farquhar*, 11 Ves. 467; *Palmer v. Wheeler*, 2 Ba. & Be. 18; *Hall v. Montague*, 8 L. J. Ch. 167.

⁴ *Maitland v. Baldwin*, 70 Hun, 267, 24 N. Y. S. 29; *Ingersoll's Estate*, 3 Pa. Dis. Co. Ct. R. 399; *Fotteral's Estate*, 2 id. 146; *Frear v. Pugsley*, 9 Misc. R. 316, 30 N. Y. S. 149. *Contra*, *Pep- per's Appeal*, 120 Pa. St. 235, 13 Atl. R. 929; *Myers v. S. D. Trust Co.*, 73 Md. 413, 21 Atl. R. 58.

⁵ *Hillen v. Iselin*, 144 N. Y. 365, 39 N. E. R. 368.

⁶ *In re Paget*, 67 Law J. Ch. 151, 1 Ch. 290, 78 Law T. (N. S.) 72, 46 Wkly. R. 328; *Mellor*, *In re*, id.; *Mellor v. Mellor*, id.

when the donee has exceeded the limitations of the power by appointing to those who are strangers to it, or by appointing a larger sum than he had the right to do, depends on the ability of the court to separate the proper part of the appointment from that which is invalid.¹

§ 804. **The illusory execution of powers.**— At common law a power to distribute a sum of money among several individuals or a class by will or deed in such shares as the donee in his discretion should see fit was validly exercised if he should give a few shillings to the majority of them and ninety-nine per cent. of the fund to one of the class. But in the court of equity, where the *real intention* of the donor of the power was sought, and, when it was found, carried out, an appointment of this sort was termed illusory. The nominal appointment would be set aside and a re-division would be decreed by which each appointee would receive some substantial benefit.² Where the power of appointment is general, equity will not interfere. But where the power is special and imperative, so that not only must it be exercised, but it must benefit only among a limited class, any execution of the power by which any member of the class is excluded from taking a substantial benefit, while others are favored, will be set aside in equity, and the appointee excluded will be let in to an equal share in the property with the others.³ And it is not material that the donee's discretion is to divide *as he may see fit and proper*, for his discretion must be exercised in a *proper and honest manner*, having in mind the amount and character of the estate, the conditions of all the parties and the relations of the appointees to the donor of the power.⁴

The presumption is that the donee has properly exercised the power and that the execution conforms to the intention of the donor. If the donee has the privilege of making an unequal distribution, equity will not, unless some members of the exclusive class have been altogether overlooked, or the distribution is grossly unjust, or some other *indicia* of fraud are present,

¹ See *post*, § 804.

³ *Faloon v. Flannery* (Minn., 1898),

² *Wall v. Thorborne*, 1 Vern. 355; 76 N. W. R. 954; *Clay v. Smallwood* (Ky.), 38 N. W. R. 7.

Maddison v. Maddison, 1 Ves. 57; *Coleman v. Seymour*, 1 Ves. 211; *Thrasher v. Ballard*, 35 W. Va. 524, 14 S. E. R. 232.

⁴ *Colton v. Colton*, 127 U. S. 300, 8 S. Ct. 1164; *Faloon v. Flannery*, *supra*.

inquire very closely into the motives which may have prompted an unequal division. And a division whose inequality may have been partially the result of dislike, anger or resentment will not be set aside on that account alone, if all the members of the class are included in the appointment and the power appears to have been executed in substantial conformity with the intention of the donor.¹

§ 805. **The extinguishment of powers.**—A general power of appointment, the exercise of which is to benefit the donee exclusively, may be released by him to the owner of the legal estate. This is so whether the power is *en gross* or collateral, for upon the release of the donee it is forever extinguished as to him. If the power is appendant and the donee conveys the legal title which he has to the land, he cannot subsequently exercise the general power of appointment, though he has not expressly mentioned that in the conveyance of the legal estate.² On the other hand, a special power which is to be exercised for the benefit of a particular class of persons, being in the nature of a trust estate, cannot be extinguished either by the actions of the donee or by his failure to exercise it.³ Thus, a collateral power in a life tenant to divide the remainder in fee, by his will, among all his children, being mandatory, will be construed as creating a power in trust for the benefit of the children, and the power is of course not extinguished by the death of the donee without executing it by his will. The same rule is also applicable to all powers which are mandatory, and also to those powers which are essentially mandatory as to their exercise, but in which the donee has a discretion as to the time and mode of exercise. The reverse is the case where the power is discretionary, not only as to time and mode, but also as to whether it shall ever be exercised or not.

So, generally, a power which is to be exercised wholly at the

¹ Vane v. Lord Dungannon, 2 Sch. & L. 180; Hatchett v. Hatchett, 103 Ala. 556, 16 S. R. 550. In England and in some of the states it is now expressly provided by statute that where the terms of a power show that a fund or any estate is to be distributed in proportions as the donee may think proper, the donee may allot the whole to any one to the ex-

clusion of the others. In re Conner's Will, 39 N. Y. S. 900, 6 App. Div. 594.

² Sugden on Powers, p. 112; Williams on R. P., p. 310; Smith v. Death, 5 Mad. 371; Albany's Case, 1 Rep. 11b, 113a.

³ Thorington v. Thorington, 82 Ala. 489. See also *ante*, § 802, for illustrations of the rule of the text.

discretion of the donee may be extinguished by the lapse of time or by the want of an object of the power. Thus, if the appointee of a power is dead, so that the execution of the power would confer no benefit upon him, or if, being alive, he has waived the execution of the power, particularly where it is merely a collateral power, with the legal title in others than the donee, it would be unjust to keep the power alive to the injury of those who have taken title to the property which is subject to it, in reliance upon the lapse of time and the actions of the parties. Thus, where land is devised to A. and B., with a collateral power in the executor to sell the land for the purpose of partition, or on request without any particular purpose, the power would undoubtedly be extinguished by the parties who are interested making an actual partition of the land and its subsequent sale to others. For generally a naked and collateral power of sale is extinguished where there is no longer any necessity for its continued existence.¹ Accordingly, where real property was devised to be held in trust until certain devisees attained the age of thirty years, when the trust was to terminate, a power of sale vested in the trustee to sell for the purpose of paying debts or legacies, or to enable them to make an equitable division of the land, was not extinguished in the donee by the devisees attaining the age of thirty years in the life-time of the testator. The exercise of the power will inure to the benefit of the beneficiaries of the trust, and it will be prolonged though the testator has expressly provided that when each reaches the age of thirty his share shall vest in him absolutely, free and discharged from the trust.²

§ 806. Who may be the donees of a power.—It is necessary that the donee of a power should have legal capacity to dispose of his own property. If the execution of the power requires the execution of an instrument, which cannot be executed by an infant because of non-age, he is not a competent donee of a power.³ But a married woman has always, in equity, enjoyed

¹ *Sites v. Eldredge*, 45 N. J. Eq. 632, 18 Atl. R. 214, 215; *Hackensack Bank v. Morse*, 46 N. J. Eq. 161; *Moore v. Moores*, 41 N. J. Eq. 440; *In re Cotton's Trusts*, L. R. 19 Ch. Div. 624; *Wilkinson v. Buist*, 124 Pa. St. 253, 16 Atl. R. 856; *Fidler v. Lash*, 125 Pa. St.

87, 17 Atl. R. 240; *Fahnestock v. Fahnestock*, 152 Pa. St. 56, 25 Atl. R. 313.

² *Johns Hopkins University v. Middleton*, 75 Md. 186, 24 Atl. R. 454.

³ 4 Kent Com. 325; 1 Sugden on Powers, 181, 211; 2 Wash. R. P. 652.

the full capacity to exercise powers of appointment to the same extent as a *femme sole*, and for this reason their employment in marriage settlements has been very common, prior to the statutory modification of the incapacity of married women. So a corporation having power under its charter to hold and to convey land may act as the donee of a power, if its execution is within the corporate powers which are conferred upon it by statute.

§ 807. Powers void for remoteness.—A power is viewed, in connection with remoteness, as in the nature of a trust, and is void if it involves the creation of a perpetuity either by its creation or by its exercise. No estate can be created in equity by means of a power which would be invalid at law for remoteness. A power may be invalid *per se* where it is to be executed in the future, because its execution, by which the fee is to be vested, may not take place within lives in being at its creation, as where a power is to be executed either by A. or his heirs, or A. and his issue. The execution of such a power may be indefinitely postponed, or it may never take place at all. Or the power may infringe the rule because its execution by the donee may create an estate which will not vest within the legal period. An example of this latter sort of power is a power in trustees to revoke contingent remainders in fee tail upon the birth of each tenant in tail, and to resettle the estate by limiting it to the newly-born tenant for *his* life, remainder in tail to his issue, thus creating an unlimited series of life estates in the unborn posterity of the first tenant, and suspending the vesting indefinitely.¹ The instrument which creates the power and the instrument by which it is to be executed are to be taken together as one in determining whether an appointment is invalid as creating a perpetuity where the power is special. The objects of the power must be those who would be competent to take under the instrument creating it.² Where

¹ Duke of Marlborough v. Earl Godolphin, 1 Eden, 404.

² Albert v. Albert, 68 Md. 352; Dana v. Murray, 122 N. Y. 604. Where by will a life estate is given, with power to appoint two or more life estates, the power is invalid in New York so

far as the total number of life estates created under both instruments exceed those permitted by the statute. Genet v. Hunt, 113 N. Y. 158, 21 N. E. R. 91; Bird v. Pickford, 71 Hun, 142; Maitland v. Baldwin, 70 Hun, 267, 24 N. Y. S. 29.

the common-law rule of perpetuities is recognized, so that vesting may be suspended for any number of lives in being and a minority thereafter, the validity of the appointment under a special power of appointment is determined by the condition of things as they exist at the time of the creation of the power; as, for example, at the death of the testator in whose will the power is created. The lives must be then in being.¹ Thus, for example, suppose property is devised for life to A., with a special power to appoint among *his* issue by will, A.'s appointment to all his issue *living at his death in fee* is valid. But his appointment to *his* children *for life*, remainder to their children or issue, would be invalid, as A. may have children born to him after the death of the donor of the power, and these children may, after A.'s death, have children born to them. The appointment to issue is valid only so far as the issue come into being during A.'s life, or in some life in being at the death of the donor.² Thus, a power to appoint among the grandchildren of a person who *is alive when the donor dies*, cannot be exercised in favor of his grandchildren whose parents were not also *then* alive.³ But an appointment under a general power will be valid if no perpetuity is created by the appointment. The distinction is based upon the fact that a general power of appointment of the fee by deed or will is nearly equivalent to a legal estate in absolute ownership. To illustrate this fully, we will suppose that the donor creates a special power in A. to appoint by will in favor of his children after a life estate in A. The children of A. on *their* birth take an interest under the instrument creating the power by way of a future use. The alienation of the fee is suspended during the life of A. Hence if he shall by his will appoint a life estate to a child of his who was not in being at the death of the donor of the power, the power of alienation will by this appointment be suspended during the life of a person not in being at the time of creating the power. On the other hand, where the power in A. was a general power, he only takes an interest under the

¹ *Fargo v. Squiers*, 154 N. Y. 250. S. 444; *Albert v. Albert*, 68 Md. 352,

² *Bristow v. Ward*, 2 Ves. Jr. 336, 12 Atl. R. 11.

350; *In re Brown*, L. R. 3 Ch. D. 156; ³ *Co. Lit.* 271, b; 2 Wash. R. P., *Hillen v. Iselin*, 67 Hun, 444, 23 N. Y. p. 671; *Sugden on Powers*, pp. 471-475.

instrument creating the power, and no perpetuity is created by it, for he may at any time by deed or will alienate the fee simple of the estate. But where the general power is to be exercised by will, the power of disposition is suspended during A.'s life, and the rule applicable to special powers applies.

If the donor of a power is to appoint to a class, *some* only of whom are incompetent to take, and the donee appoints to the whole class, as where he appoints by will among his *own issue*, which may include the children of persons who were not in being at the death of the donor, the appointment is void as to the whole class;¹ particularly where they are all to take under the appointment as *tenants in common*, for then the shares of those who are competent to take cannot be ascertained separately from the shares of the incompetent.² But where he has exercised a discretion to appoint only among those capable of taking, though others were in the class who were incapable, his execution is good, though it was possible that he might have made an invalid appointment.³

So, also, limitations in default of the execution of a power, if not themselves invalid because they create a perpetuity, are not void because the execution of the power is invalid on account of remoteness, if it was clear that the limitation in default is to take effect unless displaced by a valid execution of the power.⁴ But a devise in default of an appointment which is to be made by A. to *her* children, after a life estate in her and B., her husband, to the sons and daughters of the testator living at the death of the survivor of A. and B., and to the issue of those dead, is void for remoteness where A. marries a man *living at the death of the testator*, and dies without issue.⁵ Whether a power conferred upon a person who is *not in being at the death of the donor* is invalid depends upon the character of the power. An example of this would be a devise of life estates to the children of a person who is alive at the death of the testator,

¹ Routledge v. Dorril, 2 Ves. Jr. 357, 368; Thomas v. Thomas, 14 Sim. 234; Martin v. Pine, 29 N. Y. S. 995.

² Attenborough v. Attenborough, 1 K. & J. 296.

³ Appleton's Appeal, 136 Pa. St. 354, 20 Atl. R. 521, where the devise was

to A. in trust for the life of B., and on *her* death to convey to her appointees, and in default to her children.

⁴ In re Abbott, 3 Reports, 72; [1893] 1 Ch. 54.

⁵ In re Frost, L. R. 43 Ch. D. 246.

with a power of appointment of the fee in each child. If they have a general power of disposal, either by deed or will, the limitation is valid if the power is to vest within the legal period, though some of the life tenants are born after the date of the creation of the power. Where the general power can be exercised only by will, it is invalid, for this would result in suspending the vesting during a life not in being when the power was created.¹

¹ *Wollaston v. King*, L. R. 8 Eq. 165; *Morgan v. Gronow*, L. R. 16 Eq. 1.

CHAPTER XLI.

THE RULES REGULATING CHARITABLE GIFTS BY WILL.

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| <p>§ 808. Charity defined.</p> <p>809. The law of charitable gifts in England prior to the passage of the statute of Elizabeth.</p> <p>810. The force and operation of the statute of Elizabeth in the states of the American Union.</p> <p>811. The charity must be a public one.</p> <p>812. The validity of bequests for religious purposes.</p> <p>813. The validity of bequests for masses in England and America.</p> <p>814. Gifts for educational purposes, to establish schools, pay teachers, etc.</p> <p>815. Gifts for scientific purposes.</p> <p>816. Testamentary provisions for the poor — Validity of.</p> <p>817. Definition and classification of the poor.</p> <p>818. Gifts to orphan asylums and for the benefit of orphans and widows.</p> <p>819. The validity of testamentary gifts to the national or state government.</p> <p>820. Charitable gifts for the purpose of effecting a change in existing laws.</p> <p>821. Gifts for general benevolence or for benevolent purposes.</p> <p>822. Miscellaneous cases of charitable gifts.</p> <p>823. Testamentary provisions for the erection and care of monuments.</p> <p>824. The doctrine of <i>cy pres</i> as applied to charitable gifts by will.</p> | <p>§ 825. The status of the <i>cy pres</i> doctrine in the United States.</p> <p>826. Uncertainty and indefiniteness as regards charitable gifts.</p> <p>827. The indefiniteness of the beneficiaries of the charity.</p> <p>828. The jurisdiction of the court of equity to appoint trustees of a charitable trust.</p> <p>829. Charitable gifts to institutions which are to be incorporated in the future.</p> <p>830. The validity of charitable gifts to unincorporated and voluntary societies.</p> <p>831. Misnomer in the case of gifts to charitable institutions.</p> <p>832. Charitable gifts to executors or trustees with delegation of the power to select the institutions or objects which are to be benefited.</p> <p>833. The validity and performance of conditions which are attached to charitable gifts.</p> <p>834. The effect of the consolidation, division or dissolution of a corporation which is the donee of a charitable gift.</p> <p>835. Definition of the words pointing out the area within which the charitable funds are to be distributed.</p> <p>836. Procurement of charitable bequest by unfair means, fraud or undue influence.</p> <p>837. The English statutes of superstitious uses.</p> <p>838. The validity of bequests for the support of the Roman Catholic church in England.</p> |
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§ 839. The American view of the doctrine of superstitious uses.

840. The English statutes of mortmain.

841. Statutory limitations upon the value of property which can

be owned by charitable corporations.

§ 842. Statutory limitations upon the time of charitable gifts by will.

843. The law of testamentary charitable gifts in New York.

§ 808. Charity defined.—A charity, in a legal sense, is a “gift to be applied consistently with existing laws, for the benefit of any indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.”¹ In modern times, where neither the rules of law nor considerations of public policy forbid, the word “charity,” in its legal sense, is usually applied to almost any movement which tends to promote the comfort and moral, physical or spiritual well-being of man in society.² And usually the word “eleemosynary” used in a will is synonymous with charitable.

The law of charitable gifts, considered in its connection with wills, is of great and growing importance. The present philosophic tendency to the spread of altruistic sentiments among all classes of society, and the growing interest which is manifested by the rich in the various movements for social betterment which are under way, have led and will lead to the making of numerous gifts by will in favor of those purposes for social reform in which the testator may have a personal interest. The principles of the law of charitable bequests we will now consider.

§ 809. The law of charitable gifts in England prior to the passage of the statute of Elizabeth.—“The history of the law of charities, prior to the statute of 43 Eliz., ch. 4,” says Judge Story,³ “is extremely obscure.” We know for a certainty from

¹Jackson v. Phillips, 14 Allen (Mass.), 555, 556. For other definitions see also Erskine v. Whitehead, 84 Ind. 357, 366; In re Hewitt's Estate, 29 Pac. R. 775, 94 Cal. 376; Taylor v. Keep, 2 Bradf. (Ill.) 368; Heuser v. Harris, 42 Ill. 425; Johnson v. Johnson, 98 Ill. 364; Simpson v. Welcome,

72 Me. 496, 501; Price v. Maxwell, 28 Pa. St. 23, 35; Pell v. Mercer, 14 R. I. 412, 442; Webster v. Wiggin, 31 Atl. R. 828.

²Perry on Trusts, § 637.

³See Story's Equity Jurisprudence, §§ 1142-1154.

a perusal of the pages of English history that the practice of making charitable gifts for the benefit of the poor, for the purpose of endowing churches and monasteries, and to sustain religious worship, has prevailed to a large extent from the earliest times. Assuming that human nature is identical in all periods, and that all men are largely prompted by motives of self-interest to seek to acquire what they may of worldly possessions, it is conceivable that the disappointed heirs of those who had granted their lands or bequeathed their patrimony to the religious orders for the purpose of almsgiving, education or religious worship would have frequently made strenuous efforts in courts of justice to have such donations invalidated. Strange to say, however, very few cases of this sort are to be found in the earlier reports, either at law or in equity.

The majority of those that are reported were determined in the courts of common law, the issue in most instances being the validity of the gift because of the incapacity of the donee under some one of the statutes of mortmain or of superstitious uses.¹ Thus, in a case² which was decided by the law courts in the year 1592, the question arose as to the performance of a condition that lands should be held in trust for the support of free schools and to give the balance of the income to the poor. In this case the heir, having entered on the land for a breach of this condition, conveyed to the crown, and the court held, *first*, that the purpose of the gift was a valid one, not being within the statute forbidding superstitious uses, and *second*, that the crown took the land in trust for the purposes originally mentioned. It is worthy of remark, as pointed out by Judge Story, that the counsel who argued this case on behalf of the crown, though they cited numerous precedents, referred exclusively to those which were taken from the courts of law.

Building upon this circumstance and the uniform tradition of the times mentioned by Lord Chancellor Loughborough, that, prior to the times of Lord Ellesmere,³ no bill had been filed in chancery to establish a charity, but that the parties who considered themselves aggrieved sought relief at law, many authorities have considered that the jurisdiction of the English chancellor to enforce charitable gifts in cases where the pur-

¹ *Post*, § 839.

² *Porter's Case*, 1 Co. 266.

³ A. D. 1603.

poses or objects of the gift are indefinite, or where no trustee is named, does not antedate the statute of Elizabeth.¹ Of course it need hardly be said that where a gift or a grant was to charities *generally, no trustee being named*, or in case of a devise to a *voluntary society, or an unincorporated association*, or where the beneficiaries were both *indefinite and unascertained*, the gift would, until the statute of Elizabeth, have been held void in a court of law, because there was not a grantee competent to take, and if the court of chancery had no jurisdiction to establish the gift it would have failed. That this court always had adequate jurisdiction in such cases is maintained by very many of the later decisions, which are directly opposed to the *dictum* of Lord Ellesmere mentioned by Lord Loughborough. Thus in an early case in chancery the court expressly says that the crown, acting through the lord chancellor, undoubtedly had an inherent right to support and regulate charities aside from and *antecedent to the statute of Elizabeth*, and that it had been a matter of every-day practice in chancery that informations should be filed by the attorney-general for that purpose.² That the court of chancery had no jurisdiction to establish a charitable gift where the gift would *not have been valid at common law*, aside from and prior to the passage of the statute of Elizabeth, is admitted to be a mere conjecture based upon the silence of the reports and the tradition of the chancery bar. But the fact that very many charitable institutions, such as colleges, monasteries and churches, were in existence prior to the passage of that enactment, which could never have been valid under common-law rules, either because no person had been named to take the legal title, or because of a misnomer in the grantee, or because of the indefiniteness of the beneficiaries, warrants us in conjecturing that such charities must have been validated

¹ Lord Loughborough, in deciding the case of Attorney-General v. Bowyer, 3 Ves. 714, on page 726 says: "It does not appear that this court had cognizance upon informations for the establishment of charities. Prior to the time of Lord Ellesmere, as far as the tradition of the times immediately following goes, there were no such informations as that upon which I am now sitting (that is, an informa-

tion to establish a charity), but they made out their case as well as they could by law."

² See the remarks of the chancellor in Eyre v. Shaftsbury, 2 P. Wms. 103, on page 118. And see also the remarks of Lord Hardwicke in case of the Bailiffs, etc. of Burford v. Lanthal, 1 Atk. 550, decided in chancery.

in some competent tribunal, and it is also most natural to assume that this tribunal was the court of the king, presided over by his chancellor.¹ If the gift was to a charitable corporation existing under and by virtue of a royal charter, the courts of common law had full jurisdiction to determine the validity of the gift according to the judicial construction of the charter. If the corporation in whose favor the gift had been made had an adequate remedy at law, it was under no necessity of seeking the aid of chancery. But all charitable gifts were not given under such conditions, and we may, without doing violence to reason, assume that the applications of those who had been favored by the bounty of the rich and prosperous, which they could not enjoy under the rules of the law, to the chancellor, in order that he might enable them to receive the benefit, were numerous. And we know too that, though equity followed the law, it was still jealous of it, and in later times created estates which were absolutely and totally opposed to all common-law rules; as, for example, the separate estates of married women and trust estates generally.²

¹ In *Williams v. Williams*, 8 N. Y. 541, the court, by Denio, J., says: "From a careful examination of these authorities I have come to the conclusion that the law of charities was, at an indefinite but early period in English judicial history, engrafted upon the common law; that its general maxims were derived from the civil law, as modified in the latter periods of the empire by the ecclesiastical element introduced with Christianity; and that the statute of charitable uses was not introductory of any new principles, but was only a new and less dilatory and expensive method of establishing charitable donations, which were understood to be valid by the laws antecedently in force. The provisions of the statute itself afford irresistible evidence to my mind that such was its design and effect."

² "The elements of the doctrine of the English chancery in relation to charitable uses are to be found in

the civil law, and it is questionable whether the English system of charities is to be referred exclusively to the statute of Elizabeth. The statute has been resorted to as a guide because it furnished the largest enumeration of just and meritorious charitable uses; and it may perhaps be rather considered as a declaratory law, or specification of previously recognized charities, than as creating, as some cases have intimated, the objects of chancery jurisdiction over charities. If the whole jurisdiction of equity over charitable uses and devises was grounded on the statute of Elizabeth, then we are driven to the conclusion that, as the statute has never been re-enacted, our courts of equity in this country are cut off from a large field of jurisdiction, over some of the most interesting and meritorious trusts that can possibly be created and confided to the integrity of man. It would appear from the preamble to the stat-

That the clerical chancellors were prone to assert their independence of the courts of common law, and perhaps even to usurp some at least of the powers and jurisdiction of these tribunals, is admitted. This was exemplified in the case of trust estates. But in the case of charities no usurpation was required, for they, in most cases, had sufficient legitimate jurisdiction by reason of the cognizance which they exercised in the case of fraud, accident and mistake, and in connection with uses both before and after the statute of uses.¹ The principles and doctrines existing under these various heads they could apply with freedom with the view of avoiding the injustice which would arise from a too rigid application of the rules of the common law to all matters *not of a charitable nature*. If the feoffee to the use of a private person refused to execute his trust in accordance with the intention of the creator of the use, or if he misappropriated the funds, or if a deed or conveyance improperly executed, or executed by mistake, stood in need of reformation, and the suitor was in danger of suffering injustice because he had no adequate remedy at law, equity would not refuse its aid in a case where the property in question was *not disposed of for charities*. To have refused the like aid in the case of charitable gifts would have been to place such gifts under the ban of equity, while they were undoubtedly favored at law and by public policy. This condition of affairs is not conceivable, particularly when we consider the very liberal and untechnical rules of ancient equity, conceived in the spirit of doing justice and of carrying out the intention of those who disposed of their property in trust for the benefit of others.² The evident and plain purpose of the statute of Elizabeth, as will readily be seen upon its perusal,³ was not to create charities but to define them more accurately, and to provide a system of procedure through which, by means of commissions issued out of chancery, and directed to the bishops of the several dioceses, it might be determined, with the aid of a jury, whether the uses

ute of Elizabeth that it did not intend to give any new validity to charitable donations, but rather to provide a new and more effective remedy for the breaches of these trusts." 2 Kent, Com. 287.

¹ *Ante*, § 771 et seq.

² See the opinion of the court in *Magill v. Brown, Brightley* (Pa.), 846, delivered by Justice Baldwin, particularly what is said on pp. 389, 391.

³ In *Viner's Ab.*, tit. Charitable Uses, the statute is given at length.

were charitable, and the property thus given might be regulated and applied to carry out the intention of the donor. The ultimate decision, however, lay with the chancellor in equity, and, though the preliminary proceedings were certainly exceptional, and savored somewhat of a trial at common law, still the action of the chancellor was conclusive and not subject to review by a court of law.¹

The proceedings by a commission out of chancery soon proved to be too cumbrous and were subject to abuse and delay. They gradually fell into desuetude, and the former method of proceeding by bill in chancery upon the application of the attorney-general was largely restored. But the statute was still resorted to for the purpose of ascertaining whether or not a donation was charitable under the definitions and classifications which are contained in its preamble, and if the purpose of the testator did not range itself under or assimilate itself to some one or more of the purposes which are there enumerated as charitable in the eyes of the law, the gift was void.²

§ 810. The force and operation of the statute of Elizabeth in the states of the American Union.—The importance of determining the question whether the jurisdiction of chancery courts over charitable gifts is inherent in them prior to the statute of Elizabeth lies in the fact that in some of the states of the United States this statute has been either expressly repealed, or the courts have determined that it was local and peculiar to English institutions. Where this is the case the statute is not to be regarded as a part of the body of English statute law, which, upon the separation of the colonies from the mother country at the time of the Revolution, became a part of Ameri-

¹The authority of the chancellor was statutory and not exercised under his ordinary jurisdiction, nor could an appeal be taken to the House of Lords. *Saul v. Wilson*, 2 Vernon, 118; *Windsor v. Inhabitants of Farnham*, Cro. Car. 40.

²The preamble of the statute 43 Eliz., c. 4, is as follows: "Relief of aged, impotent and poor people, maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universi-

ties, repair of bridges, ports, havens, causeways, churches, sea-banks and highways, education and preferment of orphans, relief, stock or maintenance for houses of correction, marriage of poor maids, supportation, help, and aid of young tradesmen, handicraftsmen and persons decayed, relief or redemption of prisoners or captives, aid or ease of any poor inhabitant concerning payments of fifteens, setting out of soldiers, or to other taxes."

can jurisprudence. In some of the states a general act has been passed by the legislature, or an express provision has been inserted in the state constitution, to the effect that all English statutes generally, or, in some cases all English statutes, with a few exceptions, shall be regarded as repealed, or they shall have no force.¹ In those states a court of equity, independently of a local enabling statute, has no jurisdiction to sustain charitable trusts except by virtue of the inherent power of such a court as it may have existed in England, aside from and prior to the passage of the statute, which power has been transferred to and incorporated into the system of American equity jurisprudence as it exists in the United States. In an early case decided in the supreme court of the United States, it was held that, before the passage of the statute, the court of equity had never possessed, or at least had never exercised, any jurisdiction to carry into effect any charitable trust which would have been void under common-law rules because of the indefiniteness of the purpose of the donor or of the character of the beneficiaries.² This decision, although subsequently often dissented from by the courts of the several states, and also overruled by the decisions of the court in which it was rendered, was followed in a few of the earlier American decisions.³ Where this view prevailed, and where, at the same time, the force of the statute was *not* admitted, it was held that no charitable donation had any force or validity unless the trust was definite both as to its purpose and as regards the beneficiaries, and unless a trustee was in fact appointed. The first case in which these views were repudiated was determined in the state of Pennsylvania in the year 1835.⁴

¹ A statute which declares that no statute of Great Britain shall have any force in the courts of a state does not apply to the statute of Elizabeth, which was enacted over one hundred years prior to the union of England and Scotland, which together constitute Great Britain, and the statute of Elizabeth is not repealed thereby. *Webster v. Morris*, 66 Wis. 366, 390.

² *Baptist Association v. Hart*, 4 Wheat. (U. S., 1819), 1, 30, 39.

³ *Dashiell v. Attorney-General*, 5 H. & J. (Md., 1822), 392; *Gallago v. Attorney-General*, 8 Leigh (Va., 1832), 450. And see also the case of *Griffin v. Graham*, 1 Hawks (N. C., 1820), 196.

⁴ *McGill v. Brown, Brightley* (Pa.), 346. Indeed charitable gifts have always been regarded with much favor by the courts of this commonwealth. They have uniformly held that the statute of Elizabeth was intended not to create, but only to define, charitable trusts, and that it

The decision in the Pennsylvania case was followed by another in the state of Vermont in the year 1835, in which, after prolonged argument and an exhaustive examination of all the authorities which had been determined down to that date, the court decided that, aside from the statute, a court of equity possessed full power to enforce a charitable devise irrespective of its invalidity under the rules of the common law.¹ At length in the supreme court of the United States the doctrine received a most thorough examination, and the court decided upon a fuller investigation, in more recent times, that the conclusion was irresistible that, long prior to the passage of the statute of Elizabeth, the English chancellor had exercised the fullest jurisdiction, not only to sustain and validate indefinite and vague charitable devises where there were trustees appointed to take the legal title, but also to sustain such gifts where there were no trustees appointed, or where those who were appointed had refused or had been unable to act.² Assuming, therefore, as well settled that the statute was only remedial and confirmatory of

conferred very little power upon the English court of chancery that it did not possess and exercise prior to the statute. And though the Pennsylvania cases do not admit the statute to be in force in that state, they affirm the powers of equity to sustain a charitable trust as inherent in the court, being a part of its general power over trusts, or of its jurisdiction which it exercised by virtue of its well known powers in cases of fraud, accident and mistake, where the party injured had no adequate remedy at law. They have, therefore, while expressly ruling that the statute itself is not in force, adopted all the principles upon which it is based, and which it was enacted to enforce and regulate, and which were applied by the English courts of equity as a part of the general rules of equity. *Methodist Church v. Remington*, 1 Watts (Pa.), 218; *Zimmerman v. Anders*, 6 Watts & S. (Pa., 1843), 518; *Wright v. Lynn*, 9 Pa. St. 433; *Witman v. Lex*, 17 S. & R. (Pa., 1827), 88, 92;

Miller v. Porter, 53 Pa. St. 292; *Bethlehem v. Perseverence*, 81 Pa. St. 445; *Fountain v. Ravenal*, 17 How. (U. S.) 369; *McGirr v. Aaron*, 1 Pa. St. 49; *Mayor of Philadelphia v. James*, 3 Rawle (Pa., 1831), 170; *Martin v. McCord*, 5 Watts (Pa.), 494.

¹ *Burr's Executors v. Smith*, 7 Vt. 241.

² *Vidal v. Girard's Executors*, 2 How. (U. S., 1844), 127. In this case Justice Story says: "Whatever doubts might properly be entertained upon the subject when the case of the Trustees of the Philadelphia Baptist Association (4 Wheat. 1) was before the court (1819), those doubts are entirely removed by the later and more satisfactory sources of information to which we have alluded. The former idea was exploded and has since nearly disappeared from the jurisprudence of the country. Upon reading the statute carefully one cannot but feel surprised that the doubts thus indicated ever existed."

the jurisdiction of equity which existed when it was passed, and which had been possessed and exercised for a considerable period, the question as to the existence of the statute in the United States is not important.¹

In very many of the states the decisions go much further. Not only are the principles of English equity, under which charities were enforced and regulated as trusts prior to the statute, recognized, but the statute of Elizabeth itself is, by the decisions, expressly declared to be in force. This is the rule in Illinois, which state has, by statute, re-enacted as a part of its common law all English statutes passed prior to the fourth year of the reign of James I.;² and also in Indiana,³ Kansas, Maine,⁴ Massachusetts,⁵ Missouri⁶ and Wisconsin.⁷

¹ Williams v. Pearson, 88 Ala. 299; Green v. Dennis, 6 Conn. 292; Newsum v. Stark (1872), 46 Ga. 88; Heuser v. Allen, 42 Ill. 425; McCord v. Ochiltree, 8 Blackf. (Ind., 1846), 15; Cromie v. Orphans' Home, 3 Bush (Ky.), 371; Moore v. Moore, 4 Dana (Ky.), 60; Yingling v. Miller, 77 Md. 104, 107, 26 Atl. R. 491; Dashiell v. Attorney-General, 5 Harr. & J. (Md.) 392; Earle v. Wood, 8 Cush. (Mass.) 430; Going v. Emery, 16 Pick. (Mass.) 107; Norris v. Thompson, 19 N. J. Eq. 307; De Camp v. Dobbins, 29 N. J. Eq. 36; Yates v. Yates, 9 Barb. (N. Y.) 395; McCartee v. Orphan Asylum, 9 Cow. (N. Y.) 437; Ayres v. M. E. Church, 3 Sandf. (N. Y.) 363; Levy v. Levy, 33 N. Y. 97; Williams v. Williams, 8 N. Y. 525, 541; Bascom v. Albertson, 34 N. Y. 584, 618; Witman v. Lex, 17 S. & R. (Pa.) 88; Potter v. Thornton, 7 R. L. 263; Green v. Allen, 8 Humph. (Tenn.) 170; Dickson v. Montgomery, 1 Swan (Tenn.), 248; Franklin v. Armfield, 2 Sneed (Tenn.), 305; Bell v. Alexander, 22 Tex. 262; Hopkins v. Usher, 20 Tex. 89; Burr's Ex'rs v. Smith, 7 Vt. 241; Gallegos' Ex'rs v. Attorney-General, 3 Leigh (Va.), 450; Brook v. Shacklett, 13 Gratt. (Va.) 301; Ould v. Hospital (1877), 5 Otto (U. S.), 303; Perrin v. Carey, 24 How. (U. S.) 465; Baptist Ass'n v. Hart, 4 Wheat. (U. S.)

1, 30; Vidal v. Girard's Ex'rs, 2 How. (U. S.) 127.

² Crerar v. Williams, 141 Ill. 625, 84 N. E. R. 467; Seminary v. Morgan, 171 Ill. 441, 448; Plumleigh v. Cook, 18 Ill. 669; Ingraham v. Ingraham, 169 Ill. 432, 451; Starkweather v. American Bible Society, 72 Ill. 50.

³ McCord v. Ochiltree, 8 Blackf. (Ind.) 15, in which the court says: "The statute in question we conceive to be in aid of the common law, for, though it gave no new jurisdiction to the court of chancery, it enumerated and specified objects of its cognizance which, prior to its passage, seem to have been involved somewhat in doubt and obscurity."

⁴ Tappan v. Deblois, 45 Me. 122; Preachers' Aid Society v. Rich, 45 Me. 552; Drew v. Wakefield, 54 Me. 297.

⁵ Going v. Emery, 1 Pick. (Mass., 1834), 107; Sanderson v. White, 18 Pick. (Mass., 1836), 328; Earle v. Wood, 8 Cush. (Mass.) 430, 445; Dexter v. Gardner, 7 Allen (Mass., 1863), 242; Bates v. Bates, 134 Mass. 110, 113.

⁶ Chambers v. St. Louis, 29 Mo. 543.

⁷ Webster v. Morris, 66 Wis. 366, 390. In Illinois it has been recently held that the validity of charitable bequests, and the jurisdiction of equity over them, are not altogether dependent upon the statute of Eliza-

§ 811. **The charity must be a public one.**—Courts of equity will not enforce a trust as for a charitable purpose unless the purpose is a public and not a private one. That is to say, it must appear from the character of the gift itself that under its terms some benefit is to be conferred upon, or duty to be performed towards, the public generally, or some part thereof consisting of an indefinite class of persons. This is not to be understood as holding that a gift for *private* charity is in *every instance* illegal and void. The rule merely places gifts in trust for private charity upon the same footing as are other trusts, and requires that the beneficiaries of a private charity shall be definitely named, and that the trust for a private charity shall not offend against the rule of perpetuities.¹

The fact that the testator expressly designates a charitable trust created by him a private charity is not conclusive that it is not a public charity, and will not prevent it from being upheld as a public charity if it is such. Thus, where a testator left a sum of money “to apply to the relief of the poor and unfortunate whom I have aided in past years, and also to others, as their judgment may dictate, strictly for *private charity*,” the court sustained the gift as a valid public charity, pointing out that the class of beneficiaries was indefinite, being the poor and indigent generally.²

If the purpose of a charity is *wholly private* it will not be sustained *if it violates the rule against perpetuities*. Thus, for example, a gift to a company to enable it to keep on hand a stock of corn;³ a bequest in trust to establish a private museum in the house of Shakespear at Stratford-on-Avon;⁴ or to sustain a library which was supported by the private contributions of its members;⁵ or to provide a fund for the purchase of a cup annu-

beth, but that a charitable trust which is consistent with public policy may be created for almost anything that tends to promote the well-doing and well-being of man in society. *Garrison v. Little*, 75 Ill. App. 402.

¹*Ommanney v. Butcher*, Turn. & Rus. 260. And see also §§ 890–892.

²*Bullard v. Chandler*, 149 Mass. 532, 21 N. E. R. 951.

³*Attorney-General v. Haberdashers' Co.*, 1 My. & K. 402, 420.

⁴*Thomson v. Shakespear*, John. 612, 2 De Gex, Fisher & J. 399.

⁵*Carne v. Long*, 29 L. J. Ch. 503, 2 De Gex, Fisher & J. 75. As the fund was to be applied to the purchasing of books for a library so long as ten subscribers remain, and as the suspension of the power of alienation thus created might extend beyond the life or lives in being, the gift was void.

ally for a yacht race;¹ or to keep the clock of the testator in repair;² or to establish a school in a town, where it does not affirmatively appear but that the school might be a private school,³ has been held invalid as a charitable gift, being wholly for a private purpose. So also the care and preservation of a family homestead in perpetuity do not confer a benefit upon the public. At the most this is only a *private charity for the benefit of the descendants of the testator*. Hence, a devise to A. and his heirs of the family homestead, *always to be kept in good repair for the benefit of the family*, is invalid; and A. will take it free from the trust.⁴ So, too, where the testator directs his trustees to keep his homestead open in perpetuity for the reception and entertainment of ministers and others traveling in the service of truth, the gift is not a public charity. The trust is one *for hospitality alone, not for charity and religion*, though, as a matter of fact, it is a part of the religion of the Society of Friends, to which the testator belonged, to offer hospitality to the ministers and members who attend its yearly meetings.⁵

While it is true that a private subscription library, whose books are circulated exclusively among its paying members, is not a public charity,⁶ yet the mere fact that the circulation of the books of a library is *limited to a particular class* of persons is never enough to render it a private charity; provided such persons constitute an indefinite portion of the public generally. Thus, a Sunday school library is a public charity, if the circulation and the use of its books are *not* confined to children in the school who are members of the families of those who *support the school*, or of the families of persons belonging to a church of which the school is a part, but extend to all the children of the neighborhood who may go to the school.⁷ And the same reasoning applies in the case of a library which, though *primarily for a limited class* of beneficiaries, as men of letters and clergymen, is *not confined to them*, but may be used by the public generally.⁸

¹ In *re Nottage*, (1895) 2 Ch. 649, 12 Reports, 571.

² *Kelly v. Nichols*, 18 R. L. 1, 2, 21 Atl. R. 906.

³ *Attorney-General v. Soule*, 28 Mich. 183.

⁴ In *re Bartlett*, 163 Mass. 509, 40 N. E. R. 899.

⁵ *Kelly v. Nichols*, 18 R. L. 62, 25 Atl. R. 840.

⁶ *Carne v. Long*, 29 L. J. Ch. 503, 2 De Gex, Fish. & J. 75.

⁷ *Fairbanks v. Lamson*, 99 Mass. 533, 534.

⁸ *St. Paul's Church v. Attorney-General*, 164 Mass. 188, 195.

A friendly society, whose funds, raised by the subscriptions of its members and by fines and forfeitures imposed on them, are exclusively employed to aid any of its members who may be incapacitated from earning a living by reason of accident or illness, and which may be devoted also to pay annuities to the widows or to the next of kin of its deceased members, is not a public charitable organization which is capable of taking a gift in perpetuity for a charitable purpose.¹ But a society which is not *supported wholly by the contributions of its members*, but which is also sustained by voluntary subscriptions by the public, and, more particularly, if it also appears that poverty is an absolutely necessary requisite for receiving aid from it, is a public charity, though its benefits are confined to its members.² A trust to found an asylum for orphans is undoubtedly valid as a public charity, and such trusts have been repeatedly sustained. But a gift to a man for the benefit of a private orphan asylum, which he carried on wholly at his expense, is not for a public charity,³ as the institution is strictly private, and on its ceasing to exist the bequest will not be given over to another school.

So a gift of money to be distributed for the benefit of several families named, *according as they shall need it*, is not a public charity, though it is valid as a gift to the individuals composing the families to the extent that it does not suspend the power of alienation too long.⁴ And generally, as is elsewhere pointed out,⁵ gifts in trust for *poor relations* are valid, being regarded not as gifts either for public or private charity, but as gifts to classes of individuals, the members of which are to be ascertained by the trustees exercising their discretion.⁶

¹ *Cunnack v. Edwards*, (1896) 2 Ch. 679; *Babb v. Read*, 5 Rawle (Pa.), 151; *Swift v. Society of Easton*, 73 Pa. St. 362; *In re Clark's Trust*, L. R. 1 Ch. Div. 497; *In re Dutton*, L. R. 4 Ex. Div. 54.

² *In re Buck, Bruty v. Macky*, (1896) 2 Ch. 727. And it has very recently been held that a trust which was created for the purpose of carrying on the World's Columbian Exposition in Chicago was not a public charitable trust in the legal and technical

sense of the term, though the object of the trust was to effectuate a public enterprise, partaking largely of an educational character. *World's Col. Exposition v. United States*, 56 Fed. R. 654, 6 C. C. A. 58.

³ *Clark v. Taylor*, 1 Drew. 642.

⁴ *Liley v. Hey*, 1 Hare, 580.

⁵ See § 592.

⁶ *Webster v. Morris*, 66 Wis. 366, 392; *Isaac v. Defriez*, 17 Ves. 373, note; *White v. White*, 7 Ves. 423; *Attorney-General v. Price*, 17 Ves. 371;

The question of the public character of a charity or of an institution which claims a devise for charitable purposes is to be determined by the court upon all the circumstances proved to exist in the particular case. The mere fact that an institution, though it is carrying on a public charitable work, is partly supported by private subscriptions from those persons who, in return, enjoy peculiar privileges, or that it enacts payment from those of its inmates or beneficiaries who are able to pay, does not alone deprive it of the character of a public charity. If the institution, whether it be a library, a home for the aged, or a hospital, is not conducted with a view to making a pecuniary profit, all its surplus income being expended in increasing its resources, and if the public or any indefinite class of the public who are unable to pay are entitled to the use of its facilities gratis, it is a public charitable institution, though it may be conducted by a private corporation.¹

A gift in trust for the encouragement of a sport cannot be regarded as a charity, though the practice of the sport may be in many respects beneficial to the public. In England it has been held that a trust attempted to be created by a testator for the purpose of providing annually and forever a cup to be given to the most successful yacht of the season, though stated to be bequeathed for the purpose of encouraging the sport of yachting, was not a valid charitable gift under the statute of Elizabeth.² Doubtless, under the principle settled in this case, a devise for the purpose of establishing or maintaining a race-track, base-ball ground or a club-house for the promotion of athletics would be invalid. Nor could trusts for such purposes be regarded as charitable merely because they tend to preserve or promote the physical and mental health of those who participate in them; for, while such a result may flow from them, it is wholly incidental thereto, and by no means always necessarily follows. The object of all mere sports, whether practiced in public or in private, is amusement and relaxation, and while it may be es-

Gillam v. Taylor, L. R. 16 Eq. 581; Park's Adm'r v. American Home
Mahon v. Savage, 1 Sch. & Lef. 111. Missionary Soc., 62 Vt. 19, 20 Atl. R.
Where A. has power, under a will, to 107.

dispose of money in charitable gifts, ¹Phillips v. Harrow (Iowa, 1897), 61
he cannot give it to private persons N. W. R. 434.

in recognition of kindness and in ²In re Nottage, (1895) 2 Ch. 649, 12
testimony of affection and regard. Reports, 571; Jones v. Palmer, id.

essential to society as it is at present constituted that anything which furnishes relaxation and amusement is not to be condemned, still they cannot correctly be regarded as charities within the existing legal rules. It should not be understood, however, that a testamentary gift to a corporation is invalid merely because the object of the corporation is sport or amusement. Social or sporting clubs may of course take real and personal property for the purpose of their incorporation if they are authorized to do so by statute.

§ 812. The validity of bequests for religious purposes.— Testamentary trusts of real or personal property created for any purpose connected with the advancement of the Christian religion are unquestionably valid as public charities. So, bequests of money for repairing and for ornamenting churches,¹ or for erecting or sustaining them, have been repeatedly sustained.² In very many cases bequests for the promotion, support and propagation of religion generally have been upheld

¹ *Hoare v. Osborne*, L. R. 1 Eq. 583, 585; *In re Rigley's Trust*, 36 L. J. Ch. 147.

² *Lockwood v. Weed*, 2 Conn. 287; *Grissom v. Hill*, 17 Ark. 483; *Trustees v. Eagle Bank*, 7 Conn. 476; *Miller v. Chittenden*, 2 Iowa, 315; *Seda v. Huble*, 75 Iowa, 429, 431, 50 N. W. R. 685; *Kinney v. Kinney*, 86 Ky. 610, 6 S. R. 593; *Brown v. Kelsey*, 2 Cush. (Mass.) 243, 250; *In re Bartlett*, 163 Mass. 509, 40 N. E. R. 899; *Teele v. Bishop of Derry* (Mass., 1897), 47 N. E. R. 422; *McAlister v. Burgess* (Mass., 1898), 37 N. E. R. 173 (for the poor churches of Boston); *Goode v. McPherson*, 51 Mo. 136; *Preston v. Hawk*, 8 App. Div. 43, 37 N. Y. Supp. 1079; *Beaver v. Filson*, 8 Pa. St. 327; *Methodist Church v. Remington*, 1 Watts (Pa.) 218; *Potter v. Thornton*, 7 R. L. 252; *Baptist Society v. Hall*, 8 R. L. 234; *Brown v. Baptist Society*, 9 R. L. 177; *Frierson v. General Assembly*, 7 Heisk. (Tenn.) 683; *Webster v. Morris*, 66 Wis. 366, 380; *White v. White*, 2 Reports, 380, (1893) 2 Ch. 41; *Adnam v. Cole*, 6 Beav. 353 (a bequest to re-

pair the church and organ loft); *Turner v. Ogden*, 1 Cox. 316 (a bequest to keep the chimes of a church in repair). A bequest to repair the church, to build an organ and to maintain the parsonage is a valid charitable gift. *Bishop's Residence Co. v. Hudson*, 91 Mo. 676. A devise in trust for the benefit of the Friends' Meeting House which is situated in the town of A. is valid, though the Friends' Meeting is a voluntary association and not a corporate body. *Earle v. Wood*, 8 Cush. (Mass.) 430, 437; *Dexter v. Gardner*, 7 Allen (Mass.), 243, 247. A condition attached to a bequest to a church which the testator had attended regularly, that it is to be paid "by a trustee to help in the support of preaching as long as such is kept up as at present," is satisfactorily fulfilled by a continuation of the particular religious services of the denomination to which the society belonged, as they were conducted during the life of the testator. *King v. Grant*, 55 Conn. 166, 10 Atl. R. 505.

as charitable gifts,¹ irrespective of its particular form, provided no rule of public morality is violated by those who are its adherents in the performance of the religious rites and doctrines.

A bequest to a Roman Catholic convent is valid. If it appears that the convent is unincorporated, the court will direct that the property shall vest in the superior of the convent, the bishop of the diocese or some other person, who will take the property as a trustee for the benefit of the convent.² So, too, the validity of bequests for general missionary purposes to be used in advancing the spread of the Christian religion, either at home or in foreign countries, is admitted.³

Bequests to aid and promote the circulation of the Holy Scriptures, tracts, religious newspapers and other religious lit-

¹ *Union Baptist Soc. v. Candia*, 2 N. H. 20; *Brewster v. McCall*, 15 Conn. 274; *American Tract Soc. v. Atwater*, 80 Ohio St. 77; *Phillips v. Harrow* (Iowa, 1897), 61 N. W. R. 434. In this case the devise was "for religion, without regard to sects, and to include all denominations professing to work for the good of humanity." *Miller v. Teachout*, 24 Ohio St. 525; *North Adams v. Fitch*, 8 Gray (Mass.), 421; *Going v. Emery*, 16 Pick. (Mass.) 107; *Gibson v. McCall*, 1 Rich. Law (S. C.), 174; *Attorney-General v. Jolly*, 1 Rich. Eq. (S. C.) 99.

² In the *Goods of McAuliffe*, L. R. P. D. (1895), 290, 292; *Banks v. Phelan*, 4 Barb. (N. Y.) 80; *Academy v. Clemens*, 50 Mo. 167. It is settled beyond all dispute that the maintenance of religious worship is a public charity, irrespective of the particular sect or denomination in question; and a devise for religious purposes is not void for uncertainty whether the beneficiaries be regarded as those who attend the services for which it was intended, or the inhabitants of a place in which the church is located. *Appeal of Mack* (Conn., 1898), 41 Atl. R. 242.

³ *Carter v. Balfour*, 19 Ala. 814;

Am. Bible Soc. v. Wetmore, 17 Conn. 181; *King v. Grant*, 55 Conn. 166, 10 Atl. R. 505; *Kinney v. Kinney*, 86 Ky. 610, 6 S. W. R. 593; *Convention v. Partridge*, 65 Me. 92; *Straw v. Society*, 67 Me. 493, 494; *Dascomb v. Martin*, 80 Me. 223, 232, 13 Atl. R. 888; *Howard v. Society*, 49 Me. 288; *Missionary Society v. Chapman*, 128 Mass. 265, 267 (in this case a gift "for the missionary cause in the Methodist Episcopal Church" was held to be too indefinite, and it was consequently void as a charity); *Sohier v. St. Paul's Church*, 12 Met. (Mass.) 250, 260 ("for the support of a city missionary"); *Fairbanks v. Lamson*, 99 Mass. 533, 534 ("for the purposes of the American Board of Commissioners of Foreign Missions, and to promote the pious objects thereof"); *Bartlett v. King*, 12 Mass. 537; *Lane v. Eaton* (Minn., 1897), 71 N. W. R. 1031; *Mannix v. Purcell*, 46 Ohio St. 102, 19 N. E. R. 572; *Naumann v. Wiedman*, 182 Pa. St. 263, 267, 37 Atl. R. 863; *Domestic & For. Miss. Society's Appeal*, 30 Pa. St. 425; *Dickson v. Montgomery*, 1 Swan (Tenn.), 348; *In re Fuller's Will*, 75 Wis. 431, 44 N. W. R. 304.

erature have been often approved of by the courts.¹ So, too, gifts for the support and maintenance of preaching have frequently been sustained.² So, too, bequests for the establishment and maintenance of theological seminaries,³ or for the general purpose of *supporting indigent young men* while they are studying for the ministry, to be applied according to the discretion of the trustees, have been upheld.⁴

The rule is that a gift to support and to propagate the preaching of *any system of Christian doctrine or teaching* is a valid charitable gift. But the testator must either point out clearly and specifically what particular division of the Christian church he wishes to favor, or he must appoint a trustee to hold the legal title and select the specific mode of the practical application of his bounty to advance the interest of some particular branch of the Christian church. If, for example, the testator shall devise property to trustees for the benefit of Congregational churches, as they may in their discretion select, the power of the trustees is exclusive, and the court will not receive evidence to show that the testator intended any one branch of the Congregational church more than another.⁵ If the testator has not limited his beneficence to any particular sect of Christians, but has left the matter of the selection to his executor or a trustee, or to some one whom the court may appoint as such, it is only in case of a plain and palpable abuse of such discretion that a court of equity will interfere as between several claimants seeking to obtain shares in the gift.⁶

¹ *Simpson v. Welcome*, 72 Me. 496; *Fairbanks v. Lamson*, 99 Mass. 533, 534; *Winslow v. Cummings*, 3 Cush. (Mass.) 358; *Bliss v. Bible Society*, 2 Allen (Mass.), 334; *Bartlett v. Nye*, 4 Metc. (Mass.) 378; *In re Look's Will*, 1 Con. Sur. 408, 5 N. Y. Supp. 50; *Hornbeck v. American Bible Society*, 2 Sandf. (N. Y.) 133; *Beall v. Fox*, 4 Ga. 404; *Reynolds v. Bristow*, 37 Ga. 283; *American Bible Society v. Marshall*, 15 Ohio St. 537.

² *Trustees of Cory Un. Society v. Beatty*, 28 N. J. Eq. 570; *Parker v. Cowell*, 16 N. H. 149; *Williams v. Williams*, 8 N. Y. 525; *Brown v. Kelsey*, 2 Cush. (Mass.) 243; *Shapleigh v.*

Pillsbury, 1 Greenl. (Me.) 271; *Kimball v. Universalist Society*, 34 Me. 424; *Ayres v. Mead*, 16 Conn. 291; *Baptist Soc. v. Wilson*, 2 N. H. 508; *Second Soc. v. First Soc.*, 14 N. H. 514; *Brown v. Concord*, 38 N. H. 296.

³ *Phillips Academy v. King*, 12 Mass. 546.

⁴ *Storrs v. Whitney*, 54 Conn. 342; *McCord v. Ochiltree*, 8 Blackf. (Ind.) 18; *Whitman v. Lex*, 17 S. & R. (Pa.) 88; *White v. Fisk*, 22 Conn. 21, 31; *Williams v. Parsons*, 38 Ala. 299 (association for ministerial relief).

⁵ *Dublin's Will*, 38 N. H. 510.

⁶ *Attorney-General v. Meeting House*, 3 Gray (Mass.), 58; *Miller v.*

§ 813. **The validity of bequests for masses in England and America.**—The question of the validity of testamentary gifts for the purpose of paying for masses, or for the purpose of paying for prayers to be offered for the repose of the soul of the testator, or for the repose of the souls of other persons, has been much discussed. In England such a devise has been held illegal as constituting a disposition of property in trust for a superstitious use not authorized under the statute of charitable uses, and forbidden by the statute law of the land.¹

In the United States, where the provisions of all the constitutions, federal and state, which are the fundamental law of the land, permit, and in fact guarantee, the utmost freedom of religious belief and worship, and forbid the practice of no form of public worship that is not contrary to public morality, or that is not calculated to disturb the public peace and quiet, no objection can be made to a gift, based upon this purpose, to a priest or otherwise, for the purpose of paying him or any other person for saying prayers for the dead. The doctrine of superstitious uses, as it was laid down in the English courts under the statute 1 Edw. VI., chapter 14, and other enactments, has no place whatever in any system of American jurisprudence. The offering of prayers for the dead is a constituent and integral part of the worship of the Roman Catholic church, and a gift for that purpose, though it may be solely for the procuring of prayers for the soul of the testator or some other individual, is therefore a gift for a religious purpose and to sustain religious worship according to the faith of the deceased. Such a gift differs in no wise from a gift to sustain public preaching, or to pay for the services of an organist or a choir, or to repair a church. So in Massachusetts, Pennsylvania and some other states a testamentary gift for the purpose of paying a priest for *offering prayers for the dead generally*, has been upheld as a

Gable, 10 Paige (N. Y.), 62; Baptist Church v. Wetherell, 3 Paige (N. Y.), 96; Kniskern v. Charities, 1 Sandf. (N. Y.) 142; Presbyterian Church v. Daimon, 1 Des. (S. C.) 154. See *ante*, §§ 802–804.

¹ *Post*, § 837; Adam's Case, 4 Coke, 104b; Pitts v. James, 1 Rolle, 416; Hart v. Brewers, Cro. Eliz. 449; At-

torney-General v. Fishmonger's Co., 2 Beav. 151, 168, 5 My. & Cr. 11; West v. Shuttleworth, 2 My. & K. 684; In re Blundell's Trust, 30 Beav. 360, 363, 31 L. J. 52. See also Attorney-General v. Vivian, 1 Russ. 226; Heath v. Chapman, 2 Drew. 417; Cary v. Abbot, 7 Ves. 495, and Cro. Jac. 51.

valid charitable gift for religious purposes and as coming within the class of pious and charitable uses which are within the definition of a public charity.¹

But a bequest for masses may, in America, be invalid upon other grounds than its purpose. The general rule that the beneficiaries of a trust, charitable or otherwise, must be ascertained and definite, or ascertainable by the trustee, may be invoked. Hence, in New York, a bequest to be applied by trustees for the purpose of having prayers offered in a Roman Catholic church, to be by them selected, "for the repose of my soul, and the souls of my family, and also the souls of all others who may be in purgatory," has been held invalid because it is *impossible to ascertain the class of persons which was meant by the testator*.² If, however, the bequest is to an individual priest, or to a duly incorporated Catholic church or churches, designated distinctly by the testator and authorized by law to receive and use bequests for religious purposes and not in trust, as in the case just stated, with a discretion in the trustees to select the objects of the charity, the gift would be held valid as for a religious purpose.³ But in one instance at least it has been distinctly held that a bequest to a church "to be used in solemn masses for the repose of my soul" is not valid, as it neither

¹ Schouler's Petition, 134 Mass. 426. See also, sustaining the text, Rhymer's Appeal, 93 Pa. St. 142; Seibert's Appeal, 18 W. N. C. 276; Elmsley v. Madden, 18 Grant Ch. (U. C. Ontario), 386; In re Backes' Will, 9 Misc. Rep. 405, 30 N. Y. Supp. 394; Hagenmeyer v. Hanselmann, 2 Dem. Sur. (N. Y.) 87; In re Zimmerman's Will, 50 N. Y. S. 395; Harrison v. Brophy, 51 Pac. R. 883; Sherman v. Baker (R. L., 1898), 40 Atl. R. 11. A legacy to a priest, to be expended for masses for the repose of testatrix's soul, is a religious use, and valid under Constitution, article 1, sections 3, 4, and Constitution of the United States, amendment 1, providing for freedom of conscience and religious belief. Kerigan v. Tabb, 39 Atl. R. 701.

² Holland v. Alcock, 20 Abb. N. C. 447, 16 N. E. R. 305, 108 N. Y. 312, 316.

See also 32 Alb. Law J. 367-370, followed in In re Schwartz's Will, 3 N. Y. Supp. 134, 6 Dem. Sur. 169; In re McEvoy's Estate, 3 N. Y. Supp. 207, 6 Dem. Sur. 71; Festorazzi v. St. Joseph's Church, 104 Ala. 327, 18 S. R. 391; O'Conner v. Gifford, 117 N. Y. 275; McHugh v. Cole, 97 Wis. 166, 73 N. W. R. 631.

³ Vanderveer v. McKane, 11 N. Y. S. 808, 25 Abb. N. C. 105; Ruppell v. Schlegel, 7 N. Y. Supp. 936, 55 Hun, 183; In re Howard's Estate, 25 N. Y. S. 1111, 5 Misc. R. 295. A bequest, "I will and bequeath to the Catholic priest who may be pastor of B. church when this will shall be executed, three hundred dollars, that masses may be said for the repose of my soul," is valid. Moran v. Moran, 73 N. W. R. 617 (Iowa, 1897).

creates a valid charitable trust, nor is it valid as a direct gift to the church for religious purposes.¹

§ 814. **Gifts for educational purposes, to establish schools, pay teachers, etc.**—Gifts for the purpose of advancing the cause of education are universally admitted to be valid as public charitable gifts both under the statute of Elizabeth, and also in the United States in those states where that statute is expressly, or by implication, not in force. Hence gifts in general terms for education, not specifying in what particular mode they are to be applied,² are valid where trustees are also appointed, for in such cases courts of equity will contrive a plan for carrying the gift into practical effect. So, *a fortiori*, a gift to found public schools or colleges,³ or for the particular purpose of founding schools, seminaries and colleges, or con-

¹ *Festorazzi v. St. Joseph's Catholic Church of Mobile*, 18 S. R. 394, 104 Ala. 327. "If the bequest had been of a sum of money to an incorporated Roman Catholic church or churches, duly designated by the testator and authorized by law to receive such bequests for the purpose of the solemnization of masses, a different question would arise. But such is not the case. The bequest is to the executors in trust, to be by them applied for the purpose of having prayers offered in any Roman Catholic church they may select." *Holland v. Alcock*, 108 N. Y. 312, 2 Am. St. R. 420. A bequest to the Roman Catholic bishop of the diocese of G., "to be used and applied . . . for masses for the repose" of the testator's soul and the repose of the souls of certain other persons, is void, as it creates a trust without any beneficiaries to enforce it. *McHugh v. McCole*, 72 N. W. R. 631, 97 Wis. 166.

² *Whicker v. Hume*, 14 Beav. 509, 7 H. L. Cases, 124; *McAllister v. McAllister*, 46 Vt. 272; *Sears v. Chapman*, 158 Mass. 400; *Saltonstall v. Sanders*, 11 Allen (Mass.), 446; *Treat's Appeal*, 30 Conn. 113; *Birchard v. Scott*, 39 Conn. 63; *Newsom v. Stark*, 46 Ga. 88.

³ *Fuller v. Plainfield Academy*, 6 Conn. 544; *Silcox v. Harper*, 32 Ga. 639; *Crerar v. Williams*, 145 Ill. 625, 44 Ill. App. 497, 34 N. E. R. 467; *Piper v. Moulton*, 72 Me. 155; *Boxford Religious Soc. v. Harriman*, 125 Mass. 321, 327; *Davis v. Barnstable*, 154 Mass. 229; *Taintor v. Clark*, 5 Allen (Mass.), 67, 68; *Sears v. Chapman*, 158 Mass. 400, 401, 33 N. E. R. 604; *Bently v. Hopkins*, 14 Pick. (Mass.) 240; *Trustees v. Adams*, 65 N. H. 225, 18 Atl. R. 777; *Green v. Blackwell* (N. J. Eq., 1897), 35 Atl. R. 375; *Newcomb v. St. Peters*, 2 Sandf. Ch. (N. Y.) 636; *State v. McGovern*, 2 Ired. (N. C.) Eq. 9; *In re Johns' Will* (Oreg., 1897), 47 Pac. R. 34; *Raleigh v. Umatilla*, 15 Oreg. 172, 13 Pac. R. 890; *Zanesville, etc. Co. v. Zanesville*, 20 Ohio St. 483; *Pickering v. Shotwell*, 10 Pa. St. 23; *Price v. Maxwell*, 28 Pa. St. 23; *Wright v. Lynn*, 9 Pa. St. 433; *Pell v. Mercer*, 14 R. L. 439; *Bell v. Alexander*, 22 Tex. 350; *Paschal v. Acklin*, 27 Tex. 196; *Webster v. Morris*, 66 Wis. 366; *Dent v. Allcroft*, 80 Beav. 336; *Graham v. Paternoster*, 81 Beav. 30; *Fisher v. Brierly*, 1 De Gex, F. & J. 643; *Russell v. Allen*, 107 U. S. 163; *Baptist Association v. Hart*, 4 Wheat. (U. S.) 1; *Vidal v. Girard*, 3 How. (U. S.) 127; *Perrin v. Carey*, 24

tributing to the maintenance of those already in operation,¹ to pay the salaries of teachers in the public schools,² to aid in the education of poor children,³ to educate colored children,⁴ to establish a public school library,⁵ to increase the amount of a public school fund,⁶ for the education of young persons in the useful and economic arts,⁷ for the education of poor students for the Protestant ministry or for the Catholic priesthood,⁸ or to establish a parish school under the supervision of the authorities of a church,⁹ is valid as a charitable gift.

A devise in trust to establish a public library,¹⁰ or for a museum at a university,¹¹ is likewise a valid charitable gift.¹²

The question may arise, is the library, museum or educational institution a public charitable institution within the meaning of a bequest to the public library, or to the public schools of a particular place? The fact that the corporation which has the supervision and control of its work is not a public corporation, or the fact that persons may, upon the payment of the proper

How. (U. S.) 465; *McDonough v. Murdock*, 15 How. (U. S.) 367; *Fountain v. Ravenel*, 17 How. (U. S.) 369, 384.

¹ *Trustees v. Peaslee*, 15 N. H. 317; *Wetmore v. Parker*, 52 N. Y. 450; *Franklin v. Armfield*, 2 Sneed (Tenn.), 305; *Miller v. Porter*, 53 Pa. St. 292. And see also cases cited in last note.

² *Sanderson v. White*, 18 Pick. (Mass.) 328; *Webster v. Wiggin* (R. I., 1898), 31 Atl. R. 824, 826.

³ *Green v. Blackwell* (N. J. Eq.), 35 Atl. R. 375; *Dye v. Beaver Creek Church* (S. C.), 26 S. E. R. 717; *Heuser v. Allen*, 42 Ill. 425; *State v. Griffith*, 2 Del. Ch. 392.

⁴ *Ex parte Lindley*, 32 Ind. 367.

⁵ *Maynard v. Woodward*, 36 Mich. 423.

⁶ *Bedford v. Bedford* (Ky.), 35 S. W. R. 926.

⁷ *Webster v. Morris*, 66 Wis. 366, 395.

⁸ *Swasey v. American Baptist Pub. Soc.* 57 Me. 523; *Theological Seminary v. Attorney-General*, 135 Mass. 285, 299; *Brennan v. Winkler*, 37 S. C. 457, 16 S. E. R. 190. A bequest providing for the education of "two young men for all coming time for

the Christian ministry" is valid. *Field v. Drew Theological Seminary*, 41 Fed. R. 371.

⁹ *Halsey v. Convention of Protestant Episcopal Church* (Md.), 23 Atl. R. 781; *Hanson v. Little Sisters*, 79 Md. 434, 32 Atl. R. 1052.

¹⁰ *Beurhaus v. Cole*, 94 Wis. 617, 629; *Dascomb v. Martin*, 80 Me. 223, 232, 13 Atl. R. 888; *Penny v. Croul*, 75 Mich. 471, 43 N. W. R. 649; *Donohugh's Appeal*, 86 Pa. St. 305; *Drury v. Natick*, 10 Allen (Mass.), 169; *Duggan v. Slocum*, 83 Fed. R. 244.

¹¹ *Winthrop v. Attorney-General*, 128 Mass. 258, 261.

¹² A gift to "indigent young men to aid them in fitting themselves for the evangelical ministry" is not void for uncertainty. The words "indigent" and "evangelical" are sufficiently definite. "They describe a man who is without sufficient means of his own, and whom no person is bound and able to support, to enable him to prepare himself to preach the gospel." *Storr's Agric. School v. Whitney*, 54 Conn. 342, 352. See also *Hunt v. Fowler*, 121 Ill. 269.

fees, subscribe to it for a definite period, and during that time may enjoy peculiar privileges in taking out books, is never conclusive. If the corporation was not conducted with a view to pecuniary profit, all the income being employed in augmenting the number of books, and where the public was entitled to the use of the books in the reading-room, it is a public institution though carried on by a private corporation.¹

§ 815. Gifts for scientific purposes.— Testamentary gifts bestowed by the testator for the purpose of promoting science and education, and to secure a wider diffusion of knowledge generally, are valid as charities.

Under this classification donations for the purpose of promoting horticulture and agriculture, and “for other philosophical and philanthropical purposes;”² for “the advancement and propagation of education in economic and sanitary science;”³ for the promotion of the art of medicine;⁴ to support a historical society;⁵ for the benefit of societies organized for the prevention of cruelty to animals, and to improve the breeding of animals, and various bequests for similar purposes, have been sustained as valid.⁶

The promotion of art, including in the term sculpture and painting, though not perhaps within the letter of the statute of Elizabeth, is certainly within its spirit. Art is educational. It refines and enriches the mind, and renders more pleasant and healthful, and consequently more useful, the lives of all who are brought under its influence. It is for the general public interest that art should flourish, and the law will foster art so far as may be done consistently with recognized and settled principles. Hence, bequests for the founding of art institutes and museums, and for the purpose of giving prizes to the same, have been held to be valid.⁷

¹ Phillips v. Harrow (Iowa, 1897), 61 N. W. R. 434. And see also *ante*, pp. 1197, 1198.

² Rotch v. Emerson, 105 Mass. 431, 433.

³ In re Berridge, 63 Law Times, 470.

⁴ Stratton v. Physio-Medical College, 149 Mass. 505, 21 N. E. R. 874.

⁵ Missouri Historical Society v. Academy of Science (Mo., 1894), 8 S. W. R. 346.

⁶ In a recent case a gift to sustain an anti-vivisection society was sustained as a valid charitable gift. In re Foveaux, (1895) 2 Ch. 501.

⁷ Almy v. Jones, 17 R. L. 265, 269, 21 Atl. R. 616; British Museum v. White, 2 S. & S. 594; Yates v. University, L. R. 8 Ch. App. 454, L. R. 7 H. L. C. 438; Coates v. McKillop, 58 L. T. 212.

§ 816. **Testamentary provisions for the poor — Validity of.**— Devises and bequests for the poor and indigent generally, or for the poor of a certain city, district or neighborhood, are valid under the statute of Elizabeth, and also where that statute is not recognized. To alleviate poverty, to aid those who are in indigency, and to enable them to help themselves, have always been recognized as evincing the true spirit of charity and humanity in every system of philosophy, religion and ethics. “The poor ye have always with you; whensoever you will you may do them good,” said the Founder of Christianity, and this saying of Christ has been observed and followed by Christians of all periods as a fundamental injunction of the Master.

In view of the prominence of the duty of aiding the poor in the system of Christian belief as taught by the Founder of Christianity, and as shown in the practice of the church in all ages, a gift to one or more churches of a certain denomination for the benefit of the poor of the church is particularly favored by the courts.¹ The objection that aiding the poor is not within the corporate and charter power of the church, as a religious institution, or that it is foreign to the objects and purposes of such institutions, has absolutely no weight whatever.² And a devise to the poor of a church or a parish is not void for uncertainty where, according to the rules and discipline of the church as organized under the statute, the rector, or the deacons, or some other definite person or board, is its agent with power to determine what persons in the parish are poor and worthy to receive aid from funds provided for the purpose.³ And in New York, where a bequest which is indefinite, either in its purpose or in the beneficiaries named, is absolutely invalid, a bequest to designated churches “to buy coal for the poor of said churches” was sustained, as the purpose “to buy

¹ *Whitman v. Lex*, 17 S. & R. (Pa., 1827), 88, 90; *Attorney-General v. Old South Church*, 13 Allen (Mass.), 474, 491. (See this case for a full discussion of the subject, and for a very striking example of the way in which money, intended for the church poor, may be mismanaged and diverted by the negligence of the trustees.)

² *Conklin v. Davis*, 63 Conn. 377, 28 Atl. R. 537 (holding a gift to the poor of a church valid as a gift for maintenance of the gospel); *Succession of Auch*, 39 La. Ann. 1043, 3 S. R. 227.

³ *Goodrich's Appeal*, 57 Conn. 275, 18 Atl. R. 49.

coal" was undoubtedly germane to the purpose for which the churches existed.¹ The great majority of the decisions in both England and America sustain the rule that gifts to the poor, or to indigent persons, or to those in needy and necessitous circumstances, either generally² or with more particularity to such persons resident in a particular place, are not void *because of the indefiniteness of the class of beneficiaries*.³

§ 817. Definition and classification of the poor — Gifts by will to municipal corporations for the benefit of the poor.— The duty of caring for those persons who are within the signification of the term *paupers* is customarily imposed by statute upon the municipal or *quasi*-municipal corporation in which they may be residents. Adequate funds to enable the corporation properly to perform this duty are usually supplied by public taxation, which is levied upon the property located within the territorial limits of the corporation, or which are derived from other sources, according to circumstances.⁴ According to the majority of the decisions, gifts of money or real property to municipal corporations in trust "*for the poor*" are valid, and these corporations have capacity, in the absence of statute, to take and administer them as intended by the donor.

¹ *Bird v. Merkllee*, 144 N. Y. 544, 39 N. E. R. 645, reversing 26 N. Y. Supp. 1021. Compare *Simmons v. Burrell*, 28 N. Y. Supp. 625, where a gift to procure clothes for poor children in a church was held invalid.

² *Succession of Auch*, 39 La. Ann. 1043, 1045.

³ *Goodrich's Appeal*, 57 Conn. 275, 37 Atl. R. 395 ("the worthy poor of the town, . . . excluding from assistance or aid the criminal class, or the habitually intemperate, indolent and lazy"); *Prickett v. People*, 88 Ill. 115; *Heuser v. Harris*, 42 Ill. 425; *Erskine v. Whitehead*, 84 Ind. 357, 369 (to poor families, widows and orphans and persons in distress); *Hunt v. Fowler*, 121 Ill. 269, 277, 12 N. E. R. 33; *Phillips v. Harrow* (Iowa), 61 N. W. R. 434; *Lepage v. McNamara*, 5 Iowa, 411 (holding that a devise to poor children to be selected

by a trustee was void, as no restriction as to locality was placed upon the class of poor); *Howard v. American Peace Society*, 49 Me. 288, 303; *Darcy v. Kelly*, 153 Mass. 435, 437; *Odell v. Odell*, 10 Allen (Mass.), 1, 4; *Hesketh v. Murphy*, 36 N. J. Eq. 304; *Urmey v. Wooden*, 1 Ohio St. 160; *McIntire v. Zanesville*, 17 Ohio St. 352; *Nauman v. Weidman* (Pa. St.), 37 Atl. R. 868; *Beurhaus v. Cole*, 94 Wis. 617, 629; *Webster v. Morris*, 66 Wis. 366, 384; *Heiss v. Murphy*, 40 Wis. 276; *Lorings v. Marsh*, 6 Wall. (U. S.) 337; *In re Darling*, (1896) 1 Ch. 50; *Farquhar v. Darling*, id.; *Russell v. Kellett*, 2 Sm. & Gif. 264; *Dent v. Allcroft*, 30 Beav. 336; *Graham v. Paternoster*, 31 Beav. 30.

⁴ See *ante*, §§ 71-82, as to the capacity of municipal corporations as devisees.

So a bequest to a town in trust to "*supply fuel to the poor*,"¹ or to "*save the poor from pauperism*,"² or for the benefit of the poor generally, no specific application of the fund being mentioned in this instance, has been sustained.³

The cases which uphold the validity of a gift to a municipal corporation for the benefit of the poor assume that to alleviate poverty, to relieve the suffering of those who have but little of this world's goods, and to aid in the maintenance and support of the indigent and unfortunate of all classes, are duties which are entirely within the scope of the powers of a municipal corporation and germane to its purpose.⁴ The fact that the money given by the testator incidentally tends to relieve the rich by lessening the burdens of taxation can never be urged as a valid objection to such a bequest.⁵ Nor does the indefiniteness of the class, *i. e.*, the poor, named as beneficiaries impair or destroy the validity of the gift, as it is very well settled that gifts to a trustee (and even where no trustee is named) for the benefit of the poor generally are valid as charitable gifts.⁶ In one or two states the courts have refused to sustain a gift to a municipal corporation for the benefit of the poor generally, holding that it is void for the uncertainty of beneficiary. In reaching this decision, which constitutes an exception to the rule of law which prevails elsewhere, the supreme court of Wisconsin argued that when a gift to a class vests at the death of the testator, as was the case in this instance, it is the primary duty of the court to ascertain, if possible, what persons constitute the class at that time. In other words, who are "the poor" at the death of

¹ Webb v. Neal, 5 Allen (Mass.), 575.

² Dascomb v. Martin, 80 Me. 223, 232, 13 Atl. R. 888.

³ Hornberger v. Hornberger, 12 Heisk. (Tenn.) 635; Piper v. Moulton, 72 Me. 155, 159; Phillips v. Harrow (Iowa, 1897), 61 N. W. R. 434; Sheldon v. Town of Stockbridge, 67 Vt. 239, 31 Atl. R. 414; Wood v. Paine, 66 Fed. R. 807; Trim v. Brightman, 168 Pa. St. 395, 31 Atl. R. 1071. And a foundling asylum for the purpose of relieving unfortunate women and for caring for their offspring, and an infirmary for those unable to pay for medical attendance, being in effect

a provision for the poor, are germane to the powers of the municipal corporation, and a bequest for such purposes may be accepted by a city to which it is made. Phillips v. Harrow (Iowa), 61 N. W. R. 434.

⁴ Ante, § 74.

⁵ The fact that a gift in trust for the poor of a town adds nothing to what they are already entitled to receive from the town, and that the gift in effect tends only to relieve the taxpayers, do not invalidate it. In re Strong's Appeal (Conn.), 37 Atl. R. 395.

⁶ See § 816.

the testator? It is well known, says the court, that the word "poor" has several meanings, and it is the office of the court to ascertain, if possible, which of these meanings was in the mind of the testator when he framed his testament. He may have employed the term to signify *absolute paupers, i. e.,* those who are *permanently dependent upon alms for their maintenance,* and who are supported by the public authorities in almshouses. Or he may have desired to contribute to the support of those who, though equally indigent and helpless, are maintained in the numerous institutions which the active spirit of private benevolence has founded throughout the land. Besides these two classes of unfortunate persons, another, perhaps equally numerous, may be mentioned, composed of persons who are just as much in need, but who, because of pride, or the spirit of sturdy independence, or for some other reason, have never applied for, or availed themselves of, the aid offered by institutional charity. A fourth and the most numerous class coming within the scope of the language employed is composed of those estimable persons who, equally removed from indigency and affluence, spend their lives in a constant struggle to procure a livelihood. By their toil they are enabled to procure the necessities of life, but not to enjoy any of its luxuries, and few, if any, of its comforts. In consequence of these different meanings which attach to the word, it is impossible for a court to determine to which of these several classes of poor persons, if any, the testator intended the gift to go, or whether he wished all of them to receive some benefit.¹ In view of these considerations, it would appear that the test of the validity of a gift to a municipal corporation for the benefit of the poor depends wholly upon the meaning of the word as it is used by the testator in his will. If he meant such persons as the municipal corporation is under no statutory obligation to support, the gift might be invalid, not being germane to the powers of the municipal corporation. Most of the cases which have sustained the validity of gifts to a city for the benefit of the poor have not inquired into this branch of the question, but have either assumed that the testator intended his bounty to go in augmentation of the funds raised by taxation for the care of persons comprised within the first of the four classes above mentioned,

¹ In re Hoffen, 70 Wis. 522, 527, 528.

or have ignored an inquiry into what particular class of poor he did mean. In the state of New York, where the statute of Elizabeth is not in force, and no gift to a corporation is valid unless the corporation has power to take the gift for a purpose specified in its charter or incorporating statute, a gift to a town for the benefit of the poor has been declared void because the testator had not confined its application to that class of poor persons which the town was under a statutory liability to support. As the town had no power under its charter to take property for a purpose not permitted or recognized therein, and as it was clear that the testator, in bequeathing a sum of money to a town for the support of the poor of the town, did not intend that the money should be applied exclusively for the support of such persons only as would come within the statutory definition of poor, but that he intended to provide for all persons who, because of their poverty, were in need of assistance, the whole bequest was void.¹

§ 818. **Gifts to orphan asylums and for the benefit of orphans and widows.**—Gifts for orphans, and to support or establish asylums in which orphans may be reared and educated for lives of usefulness, are universally upheld as proper charitable gifts.² The word “orphan,” in its ordinary acceptation, means a young child who has lost *both its parents by death*. But the courts have, in construing charitable gifts for the benefit of orphans, given the word a wider meaning, including under it half-orphans as well.³ But, on the other hand, in a recent case in Wisconsin it was held that a gift for the benefit of Roman Catholic orphans was void for the indefiniteness of the beneficiaries, as the court could not decide whether the tes-

¹ Fosdick v. Hempsted, 125 N. Y. 581, 26 N. E. R. 801; In re Botsford, 23 Misc. R. 388, 52 N. Y. S. 288.

² In re Pearson's Estate (Cal., 1897), 45 Pac. R. 849; Guilfoyle v. Arthur, 158 Ill. 600, 41 N. E. R. 1009; Commissioners v. Rogers, 55 Ind. 297; Phillips v. Harrow (Iowa, 1897), 61 N. W. R. 434 (“foundling asylum, with the special view and purpose of relieving unfortunate females and caring for their offspring”); Moore v. Moore, 4 Dana (Ky.), 354; Cromie v.

Orphan Home, 3 Bush (Ky.), 371; Hazeltine v. Vose, 80 Me. 374, 14 Atl. R. 733; Mason v. Methodist Epis. Church, 27 N. J. Eq. 47; Baldwin v. Baldwin, 3 Halst. (N. J. Eq.) 211; Sawtelle v. Witham, 69 N. W. R. 72, 94 Wis. 412; Gould v. Taylor Orphan Asylum, 46 Wis. 106, 50 N. W. R. 422; Woodruff v. Marsh, 63 Conn. 125, 26 Atl. R. 846.

³ Beardsley v. Bridgeport, 53 Conn. 493; Soohan v. Philadelphia, 33 Pa. St. 1, 24-32.

tator intended to include children who had been deprived of one parent only or not.¹

The care and healing of the sick are duties and obligations of our common humanity which are sufficiently within the meaning of the term "charitable" to justify the courts in upholding gifts to found and to sustain hospitals, dispensaries and similar institutions, irrespective of the operation of the statute of charities in which they are recognized and defined as valid charitable gifts. Testamentary gifts to such institutions are favorably regarded by the court, and they will be sustained, though no trustee may have been named in the will, if the court is able to carry into effect the intention of the testator.²

The question may arise, What is an orphan asylum? in construing a gift to the "orphan asylums of a city," which is given in general terms. In California it has been held that a charitable organization known as "The Ladies' Protective and Relief Society," the object of which, according to its charter, is "to render protection and assistance to sick and dependent women and children," and which maintained a home for the care and bringing up of orphans, half-orphans and abandoned children, having under its care, on an average, over one hundred and fifty children, was "an orphan asylum," and was therefore competent to take a legacy given to the orphan asylums of the city of San Francisco.³

A testamentary gift for the benefit of *poor widows* generally;⁴ to establish an asylum for widows;⁵ for the benefit of the widows and children of seamen;⁶ or for the widows and

¹ Heiss v. Murphy, 40 Wis. 290.

² Inglis v. Sailors' Snug Harbor, 3 Peters (U. S.), 99; Hayden v. Connecticut Hospital, 64 Conn. 320, 30 Atl. R. 50 (to maintain free beds in a hospital); American Asylum v. Bank, 4 Conn. 172 (deaf and dumb asylum); Woman's Union Missionary Soc. v. Mead, 181 Ill. 33, 23 N. E. R. 603; McDonald v. Massachusetts Hospital, 120 Mass. 432; Burrell v. Boardman, 43 N. Y. 254; Ould v. Washington Hospital, 5 Otto (U. S.), 303; Philadelphia v. Elliott, 3 Rawle (Pa.), 170; Pelham v. Anderson, 2 Eden. 296, 1 Bro. C. C. 444; Attorney-General v. Kelly, 2 Beav. 575.

³ In re Pearson's Estate (Cal., 1899), 45 Pac. R. 849. But a reformatory whose inmates are wayward children, not necessarily orphans, who are committed by the police magistrates or sent to it by a society for the prevention of cruelty to children, cannot take under such a bequest. In re Pearson's Estate (Cal., 1899), 45 Pac. R. 849.

⁴ De Bruler v. Ferguson, 54 Ind. 549.

⁵ Fink v. Fink, 12 La. Ann. 301; Milne v. Milne, 17 La. Ann. 46.

⁶ Powell v. Attorney-General, 3 Mer. 48.

orphans of the members of a Masonic lodge,¹ has been held a valid charitable gift and within the purview of the statute of Elizabeth.

§ 819. **The validity of testamentary gifts to the national or the state government.**—Whether a gift to the federal government, or to the government of a state commonwealth *eo nomine*, attempting to vest the legal title to the property in it directly, and not to trustees for the benefit of the government, is valid, depends upon the express language of the statute law as it exists in the jurisdiction in which the land is situated. In England the question can but seldom arise, inasmuch as the king, in whom the title to the land which is devised to the government would vest, is a natural person, and hence capable of taking by devise under the statute of wills.² But the government of the United States, and the governments of the various states forming the Federal Union, *are neither persons nor corporations*. Hence in the case of a statute providing that lands may be devised to *every person* capable by law of holding real estate, and also to *corporations* which are, either by their charter or by the general statutory law, capable of holding lands for the purposes of their incorporation, it has been held that a devise of lands to the United States is void because of the incapacity of the devisee to take the legal title.³

A gift to the general government, for the purpose of paying off the national debt, or to enable it to establish a museum or other scientific institution, or for any other charitable and public purpose, would certainly be valid as a charitable gift. Such testamentary provisions have been repeatedly sustained as legal by the English courts.⁴ And in the federal courts, as in the courts of some of the states, similar gifts to the government of

¹ *Heiskell v. Lodge*, 3 Pickle (Tenn.), 668, 11 S. W. R. 825; *Indianapolis v. Grand Master*, 25 Ind. 518.

² 34 Henry VIII, c. 5.

³ In *re Fox*, 52 N. Y. 530, 534. The statute in New York is as follows: "Every one may devise his lands to every person capable of holding real estate, but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter or by statute to take by de-

vises." 2 N. Y. R. S., § 3. The corporations referred to in this statute are those only which are created by or under the laws of this state. *White v. Howard*, 46 N. Y. 144. Hence a devise of lands in New York to a foreign corporation is void, though the corporation is empowered by its charter to hold lands in the state where it was incorporated.

⁴ *Newland v. Attorney-General*, 8 Mer. 684; *Nightingale v. Goulbourn*,

the United States have been confirmed.¹ But the question of the capacity of the government, independently of statute, to take a devise or a bequest is quite distinct from the question of the validity of the purpose of a gift to the government. If the gift is valid as a charitable gift or bequest, and if its purpose is germane to the scope of the governmental powers, a court of equity may sustain it as a valid charitable gift; and if by statute or for any reason it is considered that the government has not the capacity to take the title directly, the court may appoint a trustee in whom the title will vest and who may carry into effect the intention of the testator. The state or federal government, like a municipal corporation, is not under any obligation to accept or to administer a testamentary charitable trust, and the legislative branch of the government, state or national, has an absolute and exclusive power to reject or accept all gifts by will. The adoption by the legislature of a report of a committee recommending that the resolution accepting a bequest be not passed is a rejection of such bequest. The action of the legislature is conclusive, and the court cannot inquire by means of parol evidence what motives prompted any member of the legislature in voting to refuse the bequest.²

§ 820. Charitable gifts for the purpose of effecting a change in existing laws.—Every person under the present laws, securing liberty of speech and the freedom of the press, has the same right to devote his property to the advancement and propagation of any opinion or set of opinions, either religious or political, which are not vicious or immoral, by a disposition to take effect upon his death, as he may do during his life-time by a personal expenditure of his means. In either case, if the scheme for the dissemination of his views involves a perpetuity, it is invalid, unless the purpose of the views which he advocates is one which may legitimately be regarded as public and charitable in its nature. The question is, Will the spread of the opinions to the advancement of which the fund is to be devoted accomplish or tend to accomplish a purpose which is public, and at the same time charitable, either under the stat-

5 Hare, 484, 2 Phill. 594; Ashton v. Dickson v. United States, 125 Mass. Longdale, 4 De Gex & Sm. 402, 15 Jur. 811, 814.

868.

² State v. Blake (Conn., 1897), 86 Atl.

¹ United States v. Fox, 94 U. S. 315; R. 1019.

ute of Elizabeth, or according to the rules of law which may be prevalent in the jurisdiction in which the trust is to be administered? Keeping these considerations in view, we must consider how far and in what manner a testamentary gift for the purpose of effecting a change in existing laws is valid as a charitable gift. It is undeniable that the mere purpose of overthrowing or of altering existing laws *per se* is not recognized as a valid charitable use, *aside from any purpose useful or beneficial to society which may be accomplished by the change in the laws.*

But, on the other hand, why should a gift of property to be devoted to the working out of a purpose which, like the abolition of slavery or the suppression of the manufacture and sale of intoxicating drink, may admittedly be of great benefit to society, be invalidated because the propagation of the opinions on which it is based is in opposition to some rule of the municipal law, and the adoption of the reform would ultimately tend to bring about a change in the law? Liberty of the press and liberty of speech, freedom to contract and freedom to worship, and all the rights and privileges which men now enjoy as subjects or citizens of the commonwealth, are the outcome of changes in pre-existing laws.

Hence it is safe to say that gifts in trust for the purpose of bringing about changes in existing conditions, and for the purposes of social improvement, would be sustained, though they might involve a change in existing laws, if the change is to be brought about by legitimate means, as by appropriate legislation, the employment of argument and persuasion, and other methods not involving any disturbance of the public peace. Thus, a devise to be applied to promote the adoption of legislation totally prohibiting the manufacture and sale of intoxicating liquors to be used as a beverage, and to create a public sentiment in favor of such legislation, is valid, being in nowise contrary to public policy, though it is intended to bring about a most radical change in the law, and one which will without doubt result in a vast amount of injury to certain classes of vested interests.¹ So, too, a testamentary gift for the purpose of circulating the works of Henry George, in which the private ownership of land and the laws securing such ownership are denounced as a system of organized robbery, and their aboli-

¹ Farewell v. Farewell, 22 Ont. R. 573.

tion by legal and peaceable means, but without remunerating the present owners, is advocated, has been held a valid charitable gift.¹

On the other hand, a bequest to trustees "to secure the passage of laws granting women, whether married or unmarried, the right to vote, hold office and . . . all civil rights enjoyed by men," was held not valid as a charitable trust.² But a bequest to trustees, which is to be used for "the attainment of women's suffrage in the United States," has recently been held in Illinois to violate no rule of public policy or of law. The purpose of the bequest is consistent with a sound public policy, irrespective of the fact that a change in existing laws is contemplated thereby. Nor is the bequest void for the indefiniteness of the beneficiaries, as the heirs of the testator, or any person interested in the subject of women's suffrage, could obtain, by the interposition of a court of equity, an enforcement of the trust. So far as the invalidity of a charitable trust intended to effect a change in the constitution of a state is concerned, this case held that the advocacy of a change in the constitution, to be effected in a proper and legal manner, *i. e.*, in the mode provided by the instrument itself, is not against public policy, and a bequest for such a purpose is valid as a

¹ *George v. Braddock*, 45 N. J. Eq. 757, 14 Am. St. R. 754, reversing 44 N. J. Eq. 124, 14 Atl. R. 108. "I cannot perceive for what reason it is incompatible with judicial position to aid, if invested with power, in the circulation of the works of a learned and ingenious man, putting under examination and discussion any part of the legal system. It would seem to me that . . . I was called upon to discard the use of means in the development of law which, in every other science, are regarded as absolute essentials. . . . What these writings are calculated and were intended to effect is to cause the repeal, in a legitimate mode, of the laws at present regulating the title to land and the substitution of a different system. It would seem to be quite out of the question for this court to

declare that such an endeavor is opposed to the law, for it is simply a proposition to alter the law, according to the law."

² *Jackson v. Phillips*, 14 Allen (Mass.), 559. "This bequest . . . aims directly and exclusively to change the laws, and its object cannot be accomplished without changing the constitution also. Whether such an alteration of the existing laws and frame of government would be wise and desirable is a question upon which we cannot, sitting in a judicial capacity, properly express any opinion. Our duty is limited to expounding the laws as they stand, and those laws do not recognize the purpose of overthrowing or changing them in whole or in part as a charitable use."

charitable gift.¹ A gift towards the political restoration of the Jews to Jerusalem and their native land was held invalid in England as tending to create a revolution in a friendly country.² And in England a trust to apply income to the circulation of books which should teach the doctrine of the absolute and inalienable supremacy of the pope in ecclesiastical affairs, with power in the trustee to establish a professorship in any college which would teach the principles laid down in the books, being against the policy of the country, is invalid.³

§ 821. Gifts for general benevolence or benevolent purposes.—Legacies are often given to trustees to distribute in their discretion for “*benevolent purposes*,” or “for the *relief of suffering*,” or for “the promotion of the *moral and social welfare of the people*,” and the question arises whether they are valid charitable gifts. The word “benevolent” in itself is very much broader in its meaning than the word “charitable” as the latter term is employed in the law. To advance benevolent purposes, or to promote the general welfare, includes acts which are not only charitable in themselves but which are a great deal more. Actions dictated by kindness, good nature, or good will, or by a disposition to do good generally, but which have no relation to the promotion of any of the charitable purposes which are enumerated in the statute of Elizabeth, or which are recognized by the law, such as the promotion of education, learning or religion, the relief of the poor, sick, afflicted, etc., are comprised under the term “benevolent.”

Gifts for benevolent or other vaguely described purposes have frequently been held invalid. Thus, a gift in trust “*solely for benevolent purposes*,”⁴ or to be used “purely and *solely for charitable purposes, for the greatest relief of human suffering, and for the good of the greatest number*,”⁵ or to be used “for such *benevolent purposes* as the executors in their integrity and discretion shall unanimously agree upon,”⁶ or “for one or more

¹ Garrison v. Little, 75 Ill. App. 402.

² Habershon v. Vardon, 4 De G. & Sm. 467, 468, 7 Eng. L. & Eq. 228, 15 Jur. 961. The court said: “Jews at present may reside in Jerusalem; and if the acquisition of political power by them was intended, the promotion of such an object would not be

consistent with our amicable relations with the Sublime Porte.”

³ Themminness v. De Bonneval, 5 Russ. 288 (1828).

⁴ Chamberlain v. Stearns, 111 Mass. 267, 269.

⁵ Everett v. Carr, 59 Me. 325, 335.

⁶ James v. Allen, 3 Mer. 17.

purposes, *charitable or philanthropic*,"¹ "for such *benevolent, charitable and religious institutions* as the executors may think proper,"² or "for the promotion of the religious, *moral and social welfare* of the people in any locality,"³ or "for such benevolent, charitable and *religious purposes* as the executors may think advantageous,"⁴ has been held invalid as a charitable gift, being void for uncertainty as to the beneficiaries, and for the further reason that the expressed *purpose of the gift does not come under the definition of a public charity*, as that word is employed in its strict legal and technical sense.⁵

The meaning of the word "benevolent" or "philanthropic," or of any similar vague term, may be restricted by the language of the context if it is associated with other words which possess a technical meaning, and which show that the testator intends to dispose of his property for charitable purposes in the technical sense of the term. Thus, a gift in trust to be expended by the trustees for *charitable and benevolent purposes* has been held valid,⁶ as for a public charity, and the same ruling was had where the gift was in aid of objects and purposes of "*benevolence and charity, public or private*," or for the education of deserving youths.⁷ In all cases where the word "benevolent" is employed in connection and association with the technical terms proper to the creation of charitable trusts, it will have a secondary and restricted meaning, and may be construed as co-extensive and synonymous with the word "charitable."⁸

¹ In *re MacDuff v. MacDuff*, (1896) 2 Ch. 451.

² *Norris v. Thompson*, 19 N. J. Eq. 307, 20 N. J. Eq. 489.

³ *Livesey v. Jones* (N. J. Ch.), 35 Atl. R. 1064.

⁴ *Williams v. Kershaw*, 5 L. J. (N. S.) Ch. 84, 5 Cl. & Fin. 111.

⁵ "It is conceded that, by the English decisions, the words '*charitable and religious*' are sufficiently definite, and it is contended that, by the same authorities, the word '*benevolent*' is not, and that a gift to *benevolent* objects or for *benevolent* institutions is void. The word '*benevolent*' is certainly more indefinite and of far wider range than charitable or

religious; it would include all gifts prompted by good will or kindly feeling toward the recipient, whether an object of charity or not. The natural and usual meaning of the word would so extend it. It has no legal meaning. The word '*charitable*' has acquired a settled limited meaning in law which confines it within known limits." Remarks of the court in *Norris v. Thompson*, 19 N. J. Eq. 307.

⁶ *Fox v. Gibbs*, 86 Me. 87, 29 Atl. R. 940; *People v. Powers*, 8 Misc. R. 628, 29 N. Y. Supp. 950.

⁷ *Saltonstall v. Sanders*, 10 Allen (Mass.), 446.

⁸ *Rotch v. Emerson*, 105 Mass. 431,

§ 822. **Miscellaneous cases of charitable gifts.**—Many instances occur of gifts which have been held valid as charitable which cannot be strictly classified under any one of the preceding heads. Thus, a bequest to trustees to be employed in suppressing the sale, manufacture and use of intoxicating liquors;¹ for the purpose of circulating the writings of Henry George dealing with economic questions;² for the distribution of good books among poor people;³ to promote the cause of peace throughout the world;⁴ for the benefit of native-born maiden ladies;⁵ to purchase land and to erect model buildings thereon for rent so as to improve the moral, physical and intellectual condition of the youth of a city;⁶ to aid apprentices in setting themselves up in business;⁷ for planting shade trees;⁸ to construct children's play grounds;⁹ to establish a protectory for boys;¹⁰ to maintain a life boat,¹¹ a botanical garden,¹² or a museum at Shakespear's house at Stratford-on-Avon,¹³ or an institution for the investigation and cure of the diseases of birds and quadrupeds which are useful to man, and to support a lecturer on the same;¹⁴ to assist in sustaining a volunteer regiment in England;¹⁵ for the benefit of the British Museum;¹⁶ or for the Royal Geographical Society;¹⁷ for a law library;¹⁸ for an

434; *Chamberlain v. Stearns*, 111 Mass. 267, 268; *Suter v. Hilliard*, 132 Mass. 413; *De Camp v. Dobbins*, 31 N. J. Eq. 695; *Adye v. Smith*, 44 Conn. 60; *In re Jarman*, L. R. 8 Ch. D. 584; *Hill v. Burns*, 2 W. & S. 80; *Crichton v. Grierson*, 3 Bligh (N. R.), 424, 3 Wils. & S. 329, 341; *Heath v. Chapman*, 2 Drew. 417; *Ewen v. Bannerman*, 2 Dow & Cl. 74, 101, 4 Wilson & Shaw, 346; *Millar v. Rowan*, 5 Cl. & Fin. 99; *Kendall v. Granger*, 5 Beav. 300; *Morice v. Bishop of Durham*, 9 Ves. 399.

¹ *Haines v. Allen*, 78 Ind. 100, 102.

² *George v. Braddock*, 45 N. J. Eq. 757, 18 Atl. R. 881.

³ *Pickering v. Shotwell*, 10 Pa. St. 23.

⁴ *Tappan v. Deblois*, 45 Me. 122.

⁵ *Fellows v. Miner*, 119 Mass. 541, 545.

⁶ *Webster v. Wiggin* (R. L.), 31 Atl. R. 824.

⁷ *Franklin's Adm'r v. City of Philadelphia*, 13 Pa. Co. Ct. R. 241, 2 Pa. Dist. Co. R. 435.

⁸ *Cresson's Appeal*, 30 Pa. St. 437.

⁹ *In re Smith*, 5 Pa. Dig. Co. R. 827.

¹⁰ *Duggan v. Slocum*, 83 Fed. R. 244.

¹¹ *Johnson v. Swan*, 3 Mad. 457.

¹² *Townley v. Bedwell*, 6 Ves. 194.

¹³ *Thompson v. Shakespear*, 1 De Gex, F. & J. 399.

¹⁴ *London University v. Yarrow*, 23 Beav. 59, 1 De Gex, G. & J. 72.

¹⁵ *Alt v. Stratheden*, 8 Reports, 515, (1894) 3 Ch. 265; *Chamberlayne v. Brockett*, L. R. 8 Ch. 206.

¹⁶ *British Museum v. White*, 2 Sim. & St. 595.

¹⁷ *Beaumont v. Oliviera*, L. R. 6 Eq. 534.

¹⁸ *Craig v. Lilly* (Pa., 1887), 9 Atl. R. 171.

“art institute,” the income to be distributed in annual prizes for the encouragement of art;¹ for the purpose of giving prizes for the advancement of medical science, and to distribute treatises;² for the benefit of soldiers and sailors who served in the War of the Rebellion, their widows and orphans;³ for a Sunday school library;⁴ a gift for deserving literary men who have been unsuccessful;⁵ for sheltering homeless people;⁶ to establish a fire engine;⁷ for the relief of disabled firemen;⁸ for the relief of emigrants and travelers;⁹ for the benefit of the members of a Masonic lodge;¹⁰ for the benefit of a Shaker community;¹¹ for the removal of slaves to Liberia;¹² to create a public sentiment that will put an end to African slavery;¹³ to protect American citizens of African descent in the enjoyment of their civil rights as provided for in the federal constitution and by the various acts of congress;¹⁴ to furnish prizes for essays;¹⁵ or for the most important discovery in light or heat made in America;¹⁶ and for the diffusion of useful knowledge and instruction among clubs and meetings of the workingmen;¹⁷ to establish a home for aged women,¹⁸ or a home for needy single women and poor widows;¹⁹ or to pay money to a certain number of persons over fifty years of age who attend a certain chapel,²⁰ has been held valid.

¹ *Almy v. Jones*, 17 R. I. 265, 21 Atl. R. 616.

² *Palmer v. President, etc. of the Union Bank*, 17 R. I. 267, 24 Atl. R. 109.

³ *Holmes v. Coates*, 159 Mass. 226, 84 N. E. R. 190.

⁴ *Fairbanks v. Lamson*, 99 Mass. 533; *Conklin v. Davis*, 63 Conn. 377, 28 Atl. R. 537.

⁵ *Thompson v. Thompson*, 1 Coll. 295.

⁶ *In re Croxall's Estate* (Pa. St., 1896), 29 Atl. R. 759.

⁷ *Bethlehem v. Perseverance Co.*, 81 Pa. St. 445; *Thomas v. Ellmaker*, 1 Pars. Cas. (Pa.) 98.

⁸ *Potts v. Philadelphia Society*, 8 Phila. R. 326; *In re Jeanes*, 3 Pa. Dist. Ct. R. 314, 34 W. N. C. 190.

⁹ *Chambers v. St. Louis*, 29 Mo. 543.

¹⁰ *McBride v. Elmer*, 2 Halst. (N. J.)

Eq. 107; *Cruse v. Axtel*, 50 Ind. 49; *Duke v. Fuller*, 9 N. H. 536.

¹¹ *Gass v. Wilhite*, 2 Dana (Ky.), 170.

¹² *Wade v. American Colonization Soc.*, 7 Sm. & M. (Miss.) 695; *Walker v. Walker*, 24 Ga. 420.

¹³ *Attorney-General v. Garrison*, 101 Mass. 227; *Jackson v. Phillips*, 14 Allen (Mass.), 550.

¹⁴ *In re Lewis' Estate*, 152 Pa. St. 477, 31 W. N. C. 460, 25 Atl. R. 878, 11 Pa. Co. Ct. R. 561.

¹⁵ *Farrer v. St. Catherine's College*, L. R. 16 Eq. 19.

¹⁶ *Amherst Academy v. Harvard College*, 12 Gray (Mass.), 582.

¹⁷ *Sweeney v. Sampson*, 5 Ind. 465.

¹⁸ *Hazeltine v. Vose*, 80 Me. 374, 14 Atl. R. 783.

¹⁹ *Swasey v. American Bible Society*, 57 Me. 523.

²⁰ *In re Wall*, 42 Ch. 510. In this

§ 823. **Testamentary provisions for the erection and care of monuments.**—A dedication of land for the maintenance of a church-yard or burial ground in connection with a church or religious society, or as a public burying ground, or even for a burial ground for persons of a particular race or class, or who are resident in a particular neighborhood, is a dedication of the land to a public and charitable use.¹ Hence a testamentary disposition either of land, or money for the purchase of land, for the establishment or the support of a public cemetery in which all persons, upon compliance with the conditions prescribed, shall have the right of interment, is valid as for a public and charitable purpose.²

A very different question arises, and one which is not altogether easy of proper solution, in the case of a gift in perpetuity to provide for the purchase of a burial plot *for the testator alone*, or for the permanent care of one already owned *by him*, or for the purchase and care of a *family burial plot*, or for the erection of a *monument to the memory of the testator*. The gift for a *public* cemetery is one that is calculated to confer a benefit upon the whole public or upon a certain large though indefinite class of the public. Every characteristic of a public charity is present. It is intended to supply a public necessity and to aid in preserving the public health by furnishing a proper and convenient place of sepulture for the dead. And as the interment of the departed with appropriate ceremonies

case the gift was sustained as a valid charitable bequest to the "aged" under the statute of Elizabeth.

¹ Hopkins v. Grimshaw, 165 U. S. 342, 353; Beatty v. Kurtz, 2 Peters (U. S.), 566, 583; Cincinnati v. White, 6 Peters (U. S.), 431, 436; Jones v. Habersham, 3 Woods, 443, 470, 107 U. S. 174, 188, 184; Dexter v. Gardner, 7 Allen (Mass.), 243, 247; Diverger v. Geary, 113 Ind. 106, 14 N. E. R. 903; In re Vaughan, 33 Ch. Div. 187.

² Bronson v. Strouse, 57 Conn. 366, 17 Atl. R. 699 (Gen. St., § 2951); Chatham v. Brainard, 11 Conn. 60; Baptist Church v. Presbyterian Church, 18 B. Mon. (Ky.) 635, 641; Dexter v. Gardner, 7 Allen (Mass.),

243; Sheldon v. Stockbridge, 67 Vt. 299; Knox v. Knox, 9 W. Va. 124; Webster v. Morris, 66 Wis. 366, 380; Naumann v. Weidmann, 182 Pa. St. 263, 267, 37 Atl. R. 863; and see cases in last note. A statute permitting a cemetery association to take property bequeathed to it in trust for the improvement of the cemetery, or the repair and preservation of any monument or gravestone, etc., in it, is a valid exercise of legislative power and permits a perpetual trust, to that extent annulling the rule against perpetuities. Hartson v. Elden, 50 N. J. Eq. 522, 525, 26 Atl. R. 561; Moore's Ex'r v. Moore, 50 N. J. Eq. 554, 561.

constitutes a part of every description of religious faith practiced in civilized communities, and is one of the most prominent religious rites which is adhered to in civilized lands, it may be said, with reason, that the supplying and dedication of public cemeteries and burial grounds are proper examples of religious or pious uses. But a gift for a *private* burial ground for the exclusive use of the family of the testator, or a provision for a *private grave* or a private family plot, stands upon a wholly different footing. The cases are irreconcilably inharmonious as to the legality of such gifts. The English decisions, while admitting the validity of bequests in perpetuity for public cemeteries, deny the validity of such gifts for private burying grounds or for private monuments, reasoning that a trust to build a private monument or to keep one in repair is not a trust for a public charitable purpose, but solely for some private purpose of the testator. Hence a gift of money in trust to provide a tomb for the testator, to purchase a *private* burial plot for him or for his family, or to keep and maintain his monument or his tomb in good condition, where the trust is to endure for a longer period than is permitted by the rule of perpetuities, is invalid. The building and repair of a private monument are matters strictly individual and personal to the deceased or to the surviving members of his family, which in no way confer any benefit upon the public generally. They cannot be regarded as a valid charitable purpose.¹

In the United States the decisions seem to favor the validity of perpetual trusts for the purchase or the maintenance and repair of private monuments and burial plots, and for the erection of private monuments. Such trusts have been frequently sustained.² A direction to an executor to purchase a grave-

¹ *Adnam v. Cole*, 6 Beav. 353; 585; *In re Rigley's Trusts*, 36 L. J. Durour v. Motteux, 1 Ves. Sen. 320; Ch. 147; *In re Burkett*, L. R. 9 Ch. D. 576; *In re Williams* (1877), L. R. 5 Ch. D. 735; *Fisk v. Attorney-General*, L. R. 4 Eq. 521; *In re Tyler*, 3 Ch. 252 (1891); *Bates v. Bates*, 134 Mass. 110, 114.
² *Johnson v. Holifield*, 79 Ala. 423; *Coit v. Comstock*, 51 Conn. 352; *Swasey v. American Bible Society*, 57 Me. 523; *Piper v. Moulton*, 72 Me. 155, 161; *Needles v. Martin*, 33 Md.

Adnam v. Cole, 6 Beav. 353; *Durour v. Motteux*, 1 Ves. Sen. 320; *Noe v. Pitcher*, 6 Taunt. 359, 370; *Lloyd v. Lloyd*, 2 Sim. (N. S.) 255, 264; *Rickard v. Robson*, 31 Beav. 244; *Fowler v. Fowler*, 33 Beav. 616, 10 Jur. (N. S.) 648; *Carne v. Long*, 8 W. R. 570; *Dawson v. Small*, 18 L. R. Eq. 114; *Mellick v. Asylum, Jacob*, 180; *Willis v. Brown*, 2 Jur. 987; *Hunter v. Bullock*, L. R. 14 Eq. 45; *Hoare v. Osborne*, L. R. 1 Eq. 583,

stone or a monument for the testator *alone*, and to erect the same, but *creating no trust*, has been sustained as valid, being properly in the line of his duty in defraying the funeral expenses; and the testator may, if he choose, devote his whole estate to this purpose.¹ The money is paid out and out, and as no trust is created no suspension of alienation can take place. But a direction that an executor shall invest an ample sum of money, the income of which shall be sufficient to keep the plot of the testator in repair, authorizes the investment of a sum of money reasonably capable to accomplish the purpose.²

609; *Bates v. Bates*, 134 Mass. 110, 114; *Gafney v. Kennison*, 64 N. H. 354, 10 Atl. R. 706; *Bell v. Briggs*, 63 N. H. 592; *Joy v. Fesler* (N. H.), 29 Atl. R. 448; *In re Fisher*, 2 Con. Sur. (N. Y.) 75; *Knox v. Knox*, 9 W. Va. 124; *Dexter v. Gardner*, 7 Allen (Mass.), 243; *Giles v. Boston Society*, 10 Allen (Mass.), 355, 357; *Green v. Hogan*, 153 Mass. 462, 466, 27 N. E. R. 413 (St. Mass., 1884, ch. 186; ch. 82, secs. 6-8, 17, etc.); *In re Boardman's Will*, 20 N. Y. Supp. 60 (holding that such a gift is not void because there is no ascertained beneficiary), overruling 8 N. Y. Supp. 10. See also *Naumann v. Weidman*, 182 Pa. St. 263, 87 Atl. R. 863; *In re Tiernay's Estate*, 2 Pa. Dist. Ct. R. 524 (Act May 26, 1891, P. L., p. 119). Gifts to a trustee or an executor for the purpose of building a monument for the testator, or for some other person, or for the purpose of caring for his grave, are not valid if they offend the rule against perpetuities, for the purpose of such gifts is not public charity. They are not *per se* illegal, and will be sustained if they are to be expended within a life or lives in being, though for a private purpose. *Lloyd v. Lloyd*, 10 Eng. L. & Eq. 139; *Piper v. Moulton*, 72 Me. 155, 160; *Hornberger v. Hornberger*, 12 Heisk. (Tenn., 1874), 635, 637; *Sherman v. Baker* (R. I., 1894), 40 Atl. R. 11.

¹*Fairman's Case*, 30 Conn. 205; *Ford v. Ford*, 91 Ky. 572; *In re Boardman*, 20 N. Y. S. 60, 61; *Wood v. Vandenberg*, 6 Paige (N. Y.), 277, 285; *Pfaler v. Raberg*, 3 Dem. Sur. (N. Y.) 360; *In re Frazer*, 92 N. Y. 239, 249; *Emans v. Hickman*, 12 Hun, 425; *McGlinsey's Appeal*, 14 S. & R. (Pa.) 64; *Bainbridge's Appeal*, 97 Pa. St. 482; *Killebrew v. Murphey*, 3 Heisk. (Tenn.) 446; *Fite v. Beasley*, 12 Lea (Tenn.), 428; *Limbrey v. Gurr*, 6 Mad. 151.

²*Gafney v. Kenison*, 64 N. H. 354, 357, 10 Atl. R. 706. Where the testator gives money, *the amount of which is not definitely stated*, to erect or repair his tomb, or for any charitable purpose which is invalid, and *the surplus to a valid charitable purpose*, all he gives must then be taken as surplus, particularly if the amount for the invalid purpose can be ascertained to be small. The valid charitable object will take as against the residuary legatee. *Fisk v. Attorney-General*, L. R. 4 Eq. 521; *In re Williams' Trust*, L. R. 5 Ch. D. 735, 739; *Hunter v. Bullock*, L. R. 14 Eq. 45; *Fowler v. Fowler*, 33 Beav. 316, 10 Jur. (N. S.) 646, 648. But if the amount which is to be devoted to an illegal purpose is uncertain and unascertainable, the whole disposition fails as a charitable gift. *Chapman v. Brown*, 6 Ves. 404.

§ 824. The doctrine of *cy pres* as applied to charitable gifts by will.—Diverse meanings attach to the term *cy pres*, according as it is employed in connection with a charity founded or attempted to be founded in England or in America. In England, in the reign of Charles II., a doctrine grew up which was fostered and advocated in the court of equity and which may be thus generally stated: Where a donor or a testator gives property to charitable purposes, and he merely states his charitable purpose, object or *intention generally*, not pointing out any specific charitable institution or purpose; or where he gives money for some specific charitable purpose which is illegal under the statutes of mortmain or superstitious uses, or because the corporation or other donee has not capacity to take, the gift of the testator may be administered *cy pres*. That is to say, the disposition of such gift was conceived to belong to the king, as *parens patriæ* and the perpetual patron and visitor of all charities, and the gift was accordingly carried into execution *as near as possible* (which is the meaning of *cy pres*) to the original intention of the testator by the action of the lord chancellor. The court of chancery, in thus carrying into effect a charitable gift that otherwise would have been void, acted by the royal sign-manual, and not by virtue of its ordinary and proper powers as a court of equity. The execution of the charitable scheme *cy pres* was effected by the royal prerogative, which, it was assumed, the king would exercise wholly for the public good, and as near as possible to the intention of the testator, so far as that intention could be ascertained. But this was matter of grace rather than of right, for the king, or his representative, the chancellor, was under no obligation to account to the heirs of the donor or to others for the exercise of his discretion. His majesty was not bound, either in law or in equity, to follow the intention of the testator, and his discretion in disposing of the property was, so long as it was given to charity, absolute and unlimited.¹ But, however arbitrary might be the royal power in theory, its practice, when its exercise was delegated to the conscientious and just men who, from time to time, exercised the functions of lord chancellor, was quite the reverse. The power of applying a charitable gift *cy pres* was regulated by careful and systematic rules, and

¹ See *Jackson v. Phillips*, 14 Allen (Mass.), 574.

guided by a desire to follow the intention of the testator as nearly as possible. Such a mode of procedure, however called, is in reality mainly a search after and a fulfillment of the intention of the testator. Hence, if the English courts had stopped here, no difference of jurisdiction would have existed in principle between them and similar courts in the United States. But they went much further. For when they could not ascertain a specific intention of the testator or the objects of such an intention by a liberal construction, or if, having ascertained the intention, they found it would be utterly disappointed because it was illegal or otherwise ineffectual, they arbitrarily supplied a specific charitable intention to carry out the assumed charitable will of the testator. *They would permit no devise to fail in which the testator had evinced a general charitable purpose.* If he failed to specify his particular purpose, to define its objects, or to give the details of his charitable scheme, or if he named an illegal purpose, the paternal jurisdiction of the chancellor would aid him by its wisdom and effectuate the abortive purpose.

Soon, as was most natural, the irresponsible power which the chancellor exercised by sign-manual as a part of the royal prerogative, and that which he exercised as presiding in a court of justice which had, both inherently and by statute, a full and competent jurisdiction of charities, became intermingled. It was difficult to draw a line of demarkation between the scope and province of the royal prerogative and the ordinary jurisdiction of the court. For this reason, as pointed out by Judge Gray,¹ a great confusion of ideas has been created by the employment of the words *cy pres* to indicate two separate and distinct powers of the English chancellor. The power of disposal by the sign-manual was a prerogative power which might be exercised by the court in direct opposition to the intention of the testator. As a rule, it was not arbitrarily exercised, though some glaring cases of injustice occurred in the reign of Charles II., when the royal prerogative was at the highest and the chancellors were absolutely subservient to the king. Such was the case often cited of a bequest to the dissenting divine Richard Baxter, to be distributed by him among sixty pious ministers who had been ejected from their benefices, which was held void as illegal under the

¹ Jackson v. Phillips, 14 Allen (Mass.), 574.

statute, and the bequest turned over to Chelsea College by the lord chancellor.¹ The case subsequently decided in which a bequest for the establishment of a Jewish synagogue was, on being found illegal, diverted to erecting and maintaining a Christian orphan asylum (probably the very last charity that the testator would have desired to benefit), justly incurred the strictures of all right-thinking men, and brought the whole doctrine of *cy pres* into deserved discredit.²

§ 825. **The status of the *cy pres* doctrine in the United States.**—The royal prerogative to supervise and control the application of charitable gifts was usually exercised in two classes of cases, though it was by no means confined to them. A gift could not be executed *cy pres* where the donor designated a particular charitable purpose which was valid. The first class of cases which were executed *cy pres* by means of the royal prerogative arose where the donor had designated a particular charitable purpose which was illegal. Thus where the charitable gift was to a charitable purpose which was plainly illegal, as for the support of the Roman Catholic Church, which was void under the statute 1 Edward VI., chapter 14, sections 5–7, and 23 Henry VIII., chapter 10, the particular purpose being illegal and void, the property would not be permitted to go to the heirs or next of kin, but the gift would be executed *cy pres*.

The second principal class of cases consisted of gifts for charitable purposes generally, but which were indefinite either as to their purpose or objects, or where no trust was created, or where, a trustee being appointed, he either died before acting or refused to perform the trust.

In the first class of cases, where the purpose of the testator or donor was illegal, the execution *cy pres* must of necessity be in direct opposition to the declared intention of the testator. Where a testator bequeaths money to a *specific* purpose which

¹ Attorney-General v. Baxter, 1 Vern. 248, 2 Vern. 105. The testator expressly declared that he gave this to these ministers because *they were good men in great need, and not because they were non-conformists*. The privy council reversed the decision of the chancellor upon the grounds that the gift was not a charitable

gift, but to the sixty ministers as individuals. This decision was just, though I do not admit of the validity of the grounds on which it was based.

² Da Costa v. De Pas, Amb. 228, 2 Swanston, 289, note, 1 Dick. 258. See also the remarks of the court in Moggridge v. Thackwell, 1 Ves. Jr. 469, and Cary v. Abbott, 7 Ves. 494, 495.

fails because of its illegality, it is reasonable to assume that he intended, in such event, that the property should go to the residuary legatee or devolve or descend as in a case of intestacy. To take a bequest which the donor gave to establish a synagogue and with it to erect a foundling asylum is an example of the grossest injustice to the heirs and next of kin which would not be tolerated in modern times. And it is immaterial whether the power to make such an absurd disposition has been attached to the crown as head of the church, "intrusted and empowered to see that nothing is done to . . . the propagation of a false religion,"¹ or whether it was introduced from the civil and Roman law under which the emperor, as the *fontes legum*, had a dispensing power by which he was the supreme law maker and source of justice. Such arbitrary power has no place in any portion of our government, state or national. It is clearly not a judicial power. Nor can it be conceived that a state legislature or the federal congress could, by statute, work a forfeiture to the government of property devised (for that is practically what it amounts to), in case the devise happens to contravene a statute. Least of all could this be done under constitutional restrictions upon the power of the legislature or judiciary to establish or to favor any form of religion.

The other main class of cases in which the doctrine under consideration has been applied consists of cases where the gift is for charity in general; that is, where there is a general and indefinite purpose, and no trust is created or trustee appointed to exercise a discretion in selecting the objects of the charity, and the court takes it upon itself by virtue of the prerogative to execute the gift within the purpose of the testator. Under such circumstances, to select a particular purpose for a testator who has himself failed to express one, to assume an intention not stated, is not a judicial power, and if exercised by a court at all must be exercised extra-judicially. Such a power *may* exist somewhere in a republican form of government. It may be vested in the legislature, to be carried out and exercised by statutes of a general character enacted within constitutional limitations and construed and enforced by the courts in conformity with recognized rules and principles of law. But in

¹ *Rex v. Portington*, 1 Salk. 162, 1 Eq. Ca. Ab. 96.

the absence of such statutes it is not for a judicial officer, sworn to interpret the laws as he finds them, to supply an intention which is not expressed.¹ Hence, generally, the *cy pres* doctrine, or anything approaching to it, as it was held in the English courts of chancery, is, and almost always has been, repudiated in the United States so far as charities are concerned, though the courts in all the states will employ the most liberal rules of construction and go to very great lengths in order to ascertain the real intention of the testator, and having ascertained it to carry it out, but only so far as it appears to have in fact existed.²

¹ "This, too, is not a judicial power of expounding and carrying out the testator's intention, but a prerogative power of ordaining what the testator has failed to express. No instance is reported, or has been discovered, in the thorough investigations of the subject, of an exercise of this power in England before the reign of Charles II. *Moggridge v. Thackwell*, 7 Ves. 69-81; *Dwight's Argument in the Rose Will Case*, 272. It has never, so far as we know, been introduced into the practice of any court in this country, and, if it exists anywhere here, it is in the legislature of the commonwealth as succeeding to the power of the king as *parens patriæ*. 4 Kent, Comm. 508, note; *Fontain v. Ravenal*, 17 How. 369, 384, 389; *Moore v. Moore*, 4 Dana, 365, 366; *Whitman v. Lex*, 17 S. & R. (Pa.) 98; *Attorney-General v. Jolly*, 1 Rich. Eq. 109; *Dickson v. Montgomery*, 1 Swan. 348; *Lepage v. McNamara*, 5 Iowa, 348; *Bartlett v. King*, 12 Mass. 545; *Sohier v. Hospital*, 3 Cush. 496, 497. It certainly cannot be exercised by the judiciary of a state whose constitution declares that the judicial department shall never exercise the legislative and executive powers, or either of them, to the end that it may be a government of laws and not of men." *Remarks of Gray, J., in the leading case of Jackson v. Phillips*, 14 Allen (Mass.), 274.

² *Carter v. Balfour*, 19 Ala. 814; *Williams v. Pearson*, 38 Ala. 299; *White v. Fisk*, 22 Conn. 31; *Hayden v. Connecticut Hospital*, 64 Conn. 320, 30 Atl. R. 50; *Starkweather v. Society*, 72 Ill. 50; *Erskine v. Whitehead*, 84 Ind. 357, 361; *Grimes v. Harmon*, 35 Ind. 246; *Johnson v. Mayne*, 4 Clarke (Iowa), 180; *Curling v. Curling*, 8 Dana (Ky.), 38; *Beekman v. Bonsor*, 28 N. Y. 298, 27 Barb. (N. Y.) 260; *Williams v. Williams*, 8 N. Y. 541; *Holland v. Alcock*, 108 N. Y. 312, 16 N. E. R. 405; *Brooks v. Brooks*, 90 Me. 326 et seq.; *Drew v. Wakefield*, 54 Me. 291; *Campbell v. City*, 102 Mo. 326, 18 S. W. R. 897; *Holland v. Peck*, 2 Ired. (N. C.) Eq. 255; *Board v. Edson*, 18 Ohio St. 221; *Kelly v. Nichols*, 18 R. L. 62, 25 Atl. R. 840; *Pringle v. Dorsey*, 3 S. C. 509; *Johnson v. Johnson*, 92 Tenn. 559; *Green v. Allen*, 5 Humph. (Tenn.) 170; *Dickson v. Montgomery*, 1 Swan (Tenn.), 348; *Smith v. Nelson*, 18 Vt. 554; *Hoffen's Estate*, 70 Wis. 522, 524; *Ruth v. Oberbrunner*, 40 Wis. 238; *Merrill v. College*, 74 Wis. 245, 415, 419; *In re Fuller's Will*, 75 Wis. 431, 44 N. W. R. 304; *Webster v. Morris*, 66 Wis. 366, 390, 391; *McHugh v. Cole*, 97 Wis. 166, 72 N. W. R. 631; *Le Clerq v. Gallipolis*, 7 Ohio, 217, and *McIntire v. Zanesville*, 17 Ohio St. 352, 360, 367 (in the latter case a devise for "poor schools in the city of Zanesville" was upon the establish-

In a few of the state courts and in the United States supreme court the *cy pres* doctrine in a modified form is recognized. Thus, in Massachusetts, it was held in the year 1867 that, where a gift was given for a charitable purpose which was lawful, the court would carry it out by devoting it to another and analogous purpose, where by reason of a change of circumstances the carrying out of the original purpose had become impracticable and useless.¹ Thus, a testamentary gift originally intended to promote the abolition of slavery, but rendered useless because, prior to the death of the testator, this result had been brought about by other means, was given over, by a court of chancery, under the doctrine of *cy pres*, to schools

ment of a free-school system devoted to night schools, etc.). "We are satisfied that the *cy pres* doctrine of England is not and should not be a judicial doctrine, except in one kind of case, and that is, where there is an available charity to an identified or ascertainable object and a particular mode, inadequate, illegal or inappropriate, or which happens to fail, has been prescribed. In such a case a court of equity may substitute or sanction any other mode that may be lawful and suitable and will effectuate the declared intention of the donor, and not arbitrarily and in the dark, presuming on his motives or wishes, declare an object for him. A court may act judicially as long as it effectuates the lawful intent of the donor. But it does not act judicially when it applies his bounty to a specific object of charity selected by itself, merely because he has dedicated it to charity generally or to a specific purpose which cannot be effectuated; for the court cannot know or decide that he would have been willing that it should be applied to the object to which the judge, in the plenitude of his unregulated discretion and peculiar benevolence, has seen fit to decree its appropriation, whereby he and not the donor, in effect and at last, creates

the charity." Remarks of the court by Robinson, C. J., in *Moore v. Moore*, 4 Dana (Ky.), 360.

¹*Jackson v. Phillips*, 11 Allen (Mass.), 539, 550. In this case the court says: "When a gift is made to trustees for a charitable purpose, the general nature of which is pointed out, and which is lawful and valid at the time of the death of the testator, and no intention is expressed to limit it to a particular institution or mode of application, and afterwards, either by change of circumstances the scheme of the testator becomes impracticable, or by change of law becomes illegal, the fund, having once vested in the charity, does not go to the heirs at law as a resulting trust, but is to be applied by the court of chancery, in the exercise of its jurisdiction in equity, as near the testator's particular direction as possible to carry out his general intent. In all the cases of charities which have been administered in the English courts of chancery without the aid of the sign-manual, the prerogative of the king, acting through the chancellor, has not been alluded to except for the purpose of distinguishing it from the power exercised by the court in its inherent jurisdiction with the assistance of its masters in chancery."

founded for the purpose of educating the freedmen and for the education of colored persons generally.¹

Where the rule of *cy pres*, as it has been defined and limited within reasonable bounds, is recognized, a gift by will for the benefit of poor families in a city to aid the children of such families in attending school was upon the establishment of free schools in that city devoted to the purchase of books for the latter.² So, where money was given to support a school-house in a particular district, and this school district was subsequently abolished by statute, the income of the money was devoted to the support of another school within the same territorial limits, though children from outside of the district attended.³ The doctrine of *cy pres* is also applicable where the testator has made a valid charitable gift in trust for a particular charitable institution definitely designated, and *after* his death, and consequently *after* the gift has vested in the particular institution, it suspends operations. In such case the trustee does not take for his own benefit, even though it be a religious corporation, but a court of equity will apply the funds for a similar charitable purpose through an institution of a similar character as that which has suspended, or as near as possible to the original intention of the testator.⁴

If, however, the testator has *not used language from which a general intent* may be implied, or if he has pointed out some particular institution or mode of application by which the charity is to be carried out, the court will not decree an execution *cy pres*, when, for any reason, the carrying into effect of the particular intent of the testator becomes impracticable. Thus, where a testatrix gave money for the purchase of a chapel,

¹ Jackson v. Phillips, 14 Allen (Mass.), 539, 550; Attorney-General v. Garrison, 101 Mass. 227; Attorney-General v. Briggs, 164 Mass. 561, 42 N. E. R. 118; Theological Society v. Attorney-General, 135 Mass. 285, 289; Stratton v. Physio-Medical Society, 149 Mass. 505, 21 N. E. R. 874.

² Birchard v. Scott, 39 Conn. 63.

³ Attorney-General v. Briggs, 42 N. E. R. 118, 164 Mass. 561.

⁴ Barnard v. Adams, 58 Fed. R. 313. The *cy pres* doctrine is supported in

its modified form by the federal courts. See Loring v. Marsh, 6 Wall. (U. S.) 337; Perrin v. Carey, 24 How. (U. S.) 465; Vidal v. Girard, 2 How. (U.S.) 127; Fontain v. Ravenal, 17 How. (U. S.) 369. The doctrine of *cy pres*, whereby trust provisions of a will are executed as near to the presumed intention of the testator as may be, is not recognized in Wisconsin. McHugh v. McCole, 72 N. W. R. 631 (Wis., 1897).

the title to which was to be vested in the bishop, for the perpetual religious services of the Roman Catholic church in her native town, and the bishop refused to take part in the matter, thus rendering the scheme impracticable, it was held that an execution of the gift *cy pres* could not be had. The intention of the testator was clearly *not a general one to advance religion in the parish*, but to build and support a chapel in one particular place, and, this failing, no other purpose could be substituted.¹ The power of equity to carry out a charitable gift *cy pres* is recognized in Missouri as a part of the inherent power of equity to execute trusts, independently of the statute of Elizabeth and irrespective of the English rule regarding it as a branch of the royal prerogative.² So where the scheme of the testator for the erection of a building which was to be occupied by two charitable corporations jointly became impracticable on account of the character and surroundings of the property, the court decreed a sale of the same and authorized each institution to receive a portion of the proceeds to be devoted to the erection of a separate edifice for each association.³ It has been noted that in Pennsylvania charitable institutions are greatly favored, and the courts go to great lengths in seeking out and effectuating the intention of the testator. And while the courts repudiate any claim to possess any branch of the royal prerogative, or to exercise any powers not entirely judicial, it may, with entire correctness, be said that they recognize a power to construe *cy pres* the charitable meaning of the testator so far as such power is modified by the principles of our government and laws.⁴

¹ Teele v. Bishop of Derry (Mass., 1898), 47 N. E. R. 422. The case of Attorney-General v. Bishop of Oxford, 1 Bro. C. C. 444, n., was similar. The testator left money to "build a church at W. where the chapel now is," and as the defendant, who was both parson and patron, would not sanction its being built, the lord chancellor, as against a claim on the part of the wardens of the old church that it should be repaired, decreed that the money should be paid to the next of kin. The charitable intention was certainly specific in both these cases.

² Missouri Historical Society v. Academy (Mo., 1895), 8 S. W. R. 346; Academy v. Clemens, 50 Mo. 167; Goode v. McPherson, 51 Mo. 126.

³ Missouri Historical Society v. Academy of Science (Mo., 1895), 8 S. W. R. 346.

⁴ Pickering v. Shotwell, 10 Barr (Pa.), 27; Methodist Church v. Remington, 1 Watts (Pa.), 218; Whitman v. Lex, 17 S. & R. (Pa., 1827), 88, 91; In re Lewis' Estate, 11 Pa. Co. Ct. R. 561; Flaherty's Estate, 2 Pars. Cas. 186; Philadelphia v. Girard, 45 Pa. St. 9.

§ 826. Uncertainty and indefiniteness as regards charitable gifts.—Although the rules of law and the principles of equity which are applicable to trusts which are not charitable are not applied with the same degree of strictness to trusts which are charitable, still, in very many cases, courts of equity have refused to sustain charitable trusts for the reason that they were indefinite and uncertain in some one or more respects. The cases in which charitable gifts have failed on account of uncertainty may be classified under three heads:

First. The uncertainty or indefiniteness which will invalidate the trust may relate to the purpose of the charitable trust itself, and it may cause a failure of the trust even where the trustee is definitely designated, as, for instance, in the case of a bequest to trustees or executors of money to devote “to charitable and religious purposes,”¹ or a bequest to the executor “for religious purposes,”² or for “foreign missionary purposes and for the poor saints,”³ or for benevolent purposes,⁴ and there is *no institution or means pointed out by which the gift may be carried into effect.*⁵

Second. The indefiniteness and uncertainty may relate to the person or to the institution that is to act as the trustee of the charity, and may arise either (a) because no trustee is named at all,⁶ or (b) because the person or institution named as trustee is incapable of taking or of executing the trust,⁷ or (c) because he or it refuses to take, or (d) because of a misnomer, as where there are two or more persons or corporations, each answering in some one or more particulars, but none answering in all, to the description as contained in the will of the testator.⁸

Third. The uncertainty and indefiniteness may relate to the character of the beneficiaries, and may arise from the mode in which they are designated by the testator, as when they are

¹ *Gambel v. Trippe*, 75 Md. 252, 23 Atl. R. 461.

² *Webster v. Morris*, 66 Wis. 366, 392.

³ *Bridges v. Pleasants*, 4 Ired. (N. C.) Eq. 26.

⁴ *Ante*, § 821.

⁵ But it should be noted in connection with this class of cases that, though the gift itself is in the vaguest and most indefinite terms

so far as its purpose is concerned, yet, if the testator has appointed a trustee with a power, in his discretion, to select some specific mode of carrying out the purpose, and of reducing it to a practical application, the gift will not fail. See cases cited under § 832.

⁶ *Post*, § 828.

⁷ *Post*, § 830.

⁸ *Post*, § 831.

so vaguely and generally designated that they cannot be ascertained either by the trustee whom the testator has named or by a court of equity to whom the trustee has applied for guidance. An example of this would be where the testator has bequeathed money to a trustee to be distributed "*among the poor and unfortunate*," or to be devoted to the "*education of the colored people*," or to be distributed "*among poor widows*,"¹ or to propagate the gospel,² and the testator has not only failed to designate the institution or mode in which his bounty is to be applied, but has also not limited it to beneficiaries in any particular place.³

Most cases of uncertainty in charitable gifts range themselves under one of these heads. Some may come under all of them. In the latter case the invalidity of the gift is incurable, and it will fail as a charitable gift. These various classes of invalid charitable gifts we will now proceed to consider in detail.

§ 827. The indefiniteness of the beneficiaries of the charity. Trusts for charitable purposes constitute a striking exception to the general rule that the *cestuis que trust for whose benefit the trust has been created must be* definitely ascertained and pointed out by the person who has given the property in trust. In the case of ordinary trusts the donor of a trust must not only confer the legal title to the property which he conveys in trust upon some definite person, but he must point out by name, or in some other equally definite manner, the particular person or persons who are to be the beneficiaries under the trust. In the case of charitable trusts the case is quite otherwise, for it is immaterial how uncertain and indefinite the ultimate beneficiaries of a charity are, if there is pointed out a legal mode of ascertaining who they are, and of distributing the bounty of the donor among them in accordance with his intention. In order to constitute a valid charitable trust the testator must, *first*, appoint a trustee, or, either expressly or by implication, show a clear intention that the court of equity shall appoint one for him; and *second*, he must direct that his money or other

¹ Gallego v. Attorney-General, 3 Leigh (Va.), 450.

² Carpenter v. Miller, 3 W. Va. 174.

³ See § 827, where the various de-

cisions on the question of the character of the beneficiaries are discussed.

property shall be applied to a purpose which is in itself legally charitable, and which is not so indefinite that it cannot be carried into execution. If he shall do this, his intention is not to fail because the beneficiaries consist of a vague, indefinite and fluctuating class of persons. Indeed, in many of the cases it has been held that the indefiniteness of the beneficiaries is of the very essence of a charitable trust, and that no trust is technically and legally charitable unless the beneficiaries are thus vague and indefinite.¹

¹ *Williams v. Pearson*, 88 Ala. 299; *People v. Cogswell* (Cal.), 45 Pac. R. 270; *Treat's Appeal*, 80 Conn. 113; *Birchard v. Scott*, 89 Conn. 63; *Beckwith v. Rector*, 69 Ga. 569; *State v. Griffith*, 2 Del. Ch. 392; *Goodrich's Appeal*, 57 Conn. 275, 18 Atl. R. 49; *Woodruff v. Marsh*, 63 Conn. 125; *Newson v. Stark*, 46 Ga. 88; *Ingraham v. Ingraham*, 169 Ill. 432, 450; *Grand Prairie Seminary v. Morgan*, 49 N. E. R. 516, 171 Ill. 444, 448; *Heuser v. Allen*, 42 Ill. 425; *De Bruler v. Ferguson*, 54 Ind. 549; *Miller v. Chittenden*, 2 Iowa, 315; *Phillips v. Harrower* (Iowa), 61 N. W. R. 434; *Lepage v. McNamara*, 5 Iowa, 414; *Kinney v. Kinney*, 86 Ky. 610, 6 S. W. R. 593; *Moore v. Moore*, 4 Dana (Ky.), 354; *Bedford v. Bedford* (Ky., 1896), 35 S. W. R. 926; *Fink v. Fink*, 12 La. Ann. 301; *Needles v. Martin*, 33 Md. 609; *Bartlett v. King*, 12 Mass. 537; *Saltonstall v. Sanders*, 11 Allen, 456, 464; *Chambers v. St. Louis*, 29 Mo. 543; *Kurzman v. Lowy*, 52 N. Y. S. 83, 23 Misc. R. 380; *Beekman v. Bonsor*, 23 N. Y. 298; *Downing v. Marshall*, 23 N. Y. 366; *Goddard v. Pomeroy*, 36 Barb. (N. Y.) 546; *Levy v. Levy*, 33 N. Y. 97; *Paschal v. Acklin*, 27 Tex. 196; *In re Ingersoll's Will*, 59 Hun, 571; *Miller v. Teachout*, 24 Ohio St. 525; *Gerke v. Purcell*, 25 Ohio St. 267; *Raley v. County of Umatilla*, 15 Oreg. 172, 13 Pac. R. 890; *Croxall's Estate* (Pa. St.), 29 Atl. R. 759; *Schultz's Appeal*, 80 Pa. St. 396; *Board of Foreign Missions v. Culp*, 151 Pa. St. 467, 25 Atl.

R. 117, 31 W. N. C. 135; *Brennan v. Winkler*, 37 S. C. 457, 16 S. E. R. 190; *Dickson v. Montgomery*, 1 Swan (Tenn.), 348; *Heiskell v. Lodge*, 3 Pickle (Tenn.), 168; *Johnson v. Johnson*, 92 Tenn. 559, 565, 23 S. W. R. 114; *Fadness v. Braunborg*, 73 Wis. 257, 41 N. W. R. 84; *Sawtelle v. Witham*, 94 Wis. 412, 414, 69 N. W. R. 72; *Dodge v. Williams*, 46 Wis. 70, 98; *Gould v. Orphan Asylum*, 46 Wis. 106. A bequest of property "to be used" by the bishop of the diocese of G., "for the benefit and behoof of the Roman Catholic Church," is too indefinite to be executed. *McHugh v. McCole*, 72 N. W. R. 631 (Wis., 1897). In some of the states it seems to be the rule, which is sustained by the earlier cases, that practically the same requirements as to the definiteness of the beneficiaries of the trust is required in the case of a charitable trust as are required where the trust is for a private purpose. See, as sustaining this view, the cases of *Needles v. Martin*, 33 Md. 609; *Dashiel v. Attorney-General*, 5 H. & J. (Md.) 32, 400; *Wilderman v. Baltimore*, 8 Md. 551; *Virginia v. Levy*, 23 Gratt. (Va.) 21; *Seaburn v. Seaburn*, 15 Gratt. (Md.) 423; *Gallego's Ex'rs v. Attorney-General*, 8 Leigh (Va.), 450; *Trustees v. Chamber's Ex'rs*, 3 Jones' Eq. (N. C.) 453; *Holland v. Peck*, 2 Ired. Eq. (N. C.) 255; *Miller v. Atkinson*, 63 N. C. 537; *Venable v. Coffman*, 2 W. Va. 310; *Carpenter v. Miller*, 3 W. Va. 174.

Thus, a gift for the benefit of the *poor generally*,¹ or for educational purposes to be expended under the direction of trustees named by the testator or to be named by the court,² for the education of worthy and indigent youths, or for the education of poor children,³ "for poor widows over the age of fifty of irreproachable character who have resided not under three years within eight miles of the town and who have no certain income,"⁴ or for an asylum for Protestant widows and orphans,⁵ has been held sufficiently definite.⁶

¹ See *ante*, §§ 816, 817.

² See § 814.

³ *Newson v. Starke*, 46 Ga. 88; *Heuser v. Allen*, 42 Ill. 425.

⁴ *Bruler v. Ferguson*, 54 Ind. 549.

⁵ *Fink v. Fink*, 12 La. Ann. 301.

⁶ In his excellent *Treatise on the Law of Trusts*, at § 732, Mr. Perry says: "It is immaterial how uncertain, indefinite and vague the *cestuis que trust* or final beneficiaries of a charitable trust are, provided there is a legal mode of rendering them certain by means of trustees appointed or to be appointed. In other words, it is immaterial how uncertain the beneficiaries or objects are, if the court, by a true construction of the instrument, has power to appoint trustees to exercise the power or discretion of making the beneficiaries as certain as the nature of the trust required them to be." "It seems to be now settled that a gift to charity, if there is a competent trustee, although there is no ascertained or ascertainable beneficiary, may still be upheld, provided the charitable use is so clearly defined as to be capable of being specifically executed and enforced as intended by the donor, by judicial decree." By the court by Johnson, J., in *Goddard v. Pomeroy*, 36 Barb. (N. Y.) 546. The late Samuel J. Tilden in his will authorized his trustees to procure "an act of incorporation of an institution to be known as the 'Tilden Trust,' with capacity to maintain and estab-

lish a free library and reading room, . . . and to promote such scientific and educational objects as my said executors and trustees may more particularly designate; and such institution shall be incorporated in a form and manner satisfactory to my said trustees." The testator further said that "I hereby authorize my said executors and trustees to organize the said corporation, designate the first trustees thereof, and to convey or apply to the use of the same the rest, residue and remainder of all my real and personal estate not specifically disposed of, . . . or so much thereof as they may deem expedient," subject to the special trusts therein created. "But in case such institution shall not be so incorporated" within the times mentioned, "or if for any cause or reason my said executors and trustees shall deem it inexpedient to convey said residue, "or any part thereof, or to apply the same, or any part thereof, to the said institution, I authorize" them to apply it, "after making good the said special trusts herein directed to be constituted, . . . to such charitable, educational and scientific purposes as in the judgment of my said executors and trustees will render the rest, residue and remainder of my property most widely and substantially beneficial to the interests of mankind."

In construing this will the court of appeals held that, *first*, the scheme as

§ 828. The jurisdiction of the court of equity to appoint trustees of charitable trusts.—A court of equity, by virtue of its jurisdiction over trusts and charities, has inherent power to appoint trustees in the case of every valid charitable trust, where the testator or grantor has either failed to designate a trustee, or where the trustee who has been designated refuses, neglects, or is unable to carry out the trust. A court of equity will not permit a charitable trust, which in itself is valid, to fail for want of a trustee. In this respect no distinction exists¹ between private trusts and charitable trusts. If the testator creates a trust for a charitable purpose which is definite and valid, and the objects of which are sufficiently ascertained and certain as a class, and fails to nominate a trustee, or in express terms delegates the appointment of the trustee to the court, the court will, on the application of the proper parties, appoint a trustee. So, also, where a testator has given property to an unincorporated association, or where he has in his will directed that a charitable corporation shall be formed, for purposes which are sufficiently definite and certain, and has made no disposition of the legal interest in the property which he devises to such unincorporated or non-existent institution, the court will appoint a trustee who is capable of taking and hold-

outlined by the testator was entire and inseparable, covering and including the whole residue in one comprehensive disposition. That the testator had not made a disposition of his estate in the alternative under two distinct provisions, one primary for the founding of the Tilden Trust, and an ulterior provision of a secondary nature, to be put into operation only in the event that the trustees named by him should deem it inexpedient to convey the whole residue for the purposes of the Tilden Trust.

Second. Irrespective of the character of the power vested in the trustees to select a beneficiary, that is, whether it was a valid trust with the legal title in the trustees, or simply a naked power to select, its exercise was imperative.

Third. The court held that under the language of the will, giving the trustees power to devote the residue "to such charitable, educational and scientific purposes as in the judgment of my said trustees will render the rest, residue and remainder of my property most widely and substantially beneficial to the interest of mankind," the beneficiaries are indefinite and uncertain, and that consequently the power in trust, or the trust, as the case may be, cannot be enforced by a court of equity. The devise therefore was held void and the residue devolved upon the next of kin of the testator. *Tilden v. Green*, 28 N. E. R. 880, 130 N. Y. 29, 29 N. E. R. 1033, affirming 7 N. Y. Supp. 382.

¹ Except in the state of New York, § 843.

ing the legal title, with directions to carry out the wishes of the testator.

In the case of an unincorporated institution the trustee will hold the legal title for the members of the association, or for such purposes as are germane to the association.¹ Where the institution is to be incorporated at some future date, the trustee appointed by the court will hold the legal title until the institution shall have been incorporated, when he will, under the directions of the court, convey it to the institution.² The appointment of a trustee by the court should be surrounded by such safeguards as will secure the appointment of a proper person to the office. An application for the purpose ought to be made by some person who is interested in the enforcement of the trust, in connection with the attorney-general of the state, and on full and sufficient notice to all the parties interested.³

So if the testator shall devise property for a general and definite charitable purpose, and shall appoint trustees of the fund, conferring on them full discretion to select the objects

¹ See cases in next note.

² Bull v. Bull, 8 Conn. 47; Storr's School v. Whitney, 54 Conn. 345; Conklin v. Davis, 63 Conn. 377, 383; Grand Prairie Sem. v. Morgan, 49 N. E. R. 516, 171 Ill. 444, 452; Hoeffler v. Clogan, 171 Ill. 462; Seda v. Huble, 75 Iowa, 429, 39 N. W. R. 685; Preachers' Aid Society v. Rich. 45 Me. 552; Swasey v. American Bible Soc., 57 Me. 526; Bliss v. Am. Bible Society, 2 Allen (Mass.), 334; Winslow v. Cumming, 3 Cush. (Mass.) 558; Minot v. Baker, 147 Mass. 348, 353, 17 N. E. R. 839; Darcy v. Kelly, 153 Mass. 435, 437, 26 N. E. R. 110; Schouler's Petition, 134 Mass. 426, 428; Sears v. Chapman, 158 Mass. 400, 401, 33 N. E. R. 604; North Adams v. Fitch, 8 Gray (Mass.), 421; Sanderson v. White, 18 Pick. (Mass.) 328; McLain v. Directors, 51 Pa. St. 106; McGirr v. Aaron, 1 P. & Watts (Pa.), 49; Johnson v. Johnson, 92 Tenn. 559, 565; Stone v. Griffin, 3 Vt. 400; Gould v. Asylum, 46 Wis. 106, 117; Mason v. M. E.

Church, 27 N. J. Eq. 47. The validity of the testator's delegation of power to appoint trustees to carry out his charitable scheme to judges of the state or federal courts cannot now be questioned. But the policy of the testator in thus invoking the aid of a judge of whom he knows nothing and whom he has never heard or seen, and who may appoint an entire stranger to put into operation his charitable plans, when the latter might, on the other hand, commit their execution to some one in his personal confidence, may well be doubted. The fact that the judges are not to exercise the power to appoint a trustee until fifteen years after the testator's death, the property meanwhile being vested in other trustees, will not render the charitable gift uncertain. In re John (Oreg.), 47 Pac. R. 341.

³ Green v. Blackwell (N. J. Eq.), 35 Atl. R. 375.

of the charity, and to specify and define more particularly the purpose of the gift; in other words, where a testator confers power upon the trustees to reduce his general indefinite and vaguely described purpose to a proper application and method, and the trustees die without having acted, or if one or all refuse to act, the court will appoint new trustees in their place.¹ And if the trustee of the property to be disposed of in his discretion dies after having disposed of only a small portion of it, the remainder will be applied to charitable purposes indicated by the testator, under the supervision of a trustee appointed by the court of equity.² So, also, where the action of the trustee, in the distribution of the trust fund, is to be regulated by the request of another person, the court, upon the neglect of the third person to act, will remove him and appoint another in his place.³ But on the other hand, where it clearly appears from the language of the will that the discretionary power which was placed by the testator in a trustee was a matter of personal confidence, or if it clearly appears that his discretion was not only as to the mode of his action, *i. e.*, as to how much or how little he should distribute, and to whom, but that his discretion included the decision of the question whether he should act at all in favor of a charity, or whether he should devote the fund of which he is trustee to non-charitable purposes, the court will neither compel him to exercise his discretionary power nor appoint a new trustee.⁴

§ 829. Charitable gifts to institutions which are to be incorporated in the future.—At the common law in England every grant or devise of land was invalid unless the grantee or devisee was a natural person, or a corporation *in esse* at the death of the testator.⁵ The validity of a devise for charitable purposes to a corporation which is to be created in the future is of comparatively modern origin. It was not recognized by the English courts until the beginning of the nineteenth century. Thus, as early as the time of Henry VI., it was laid down that a devise to an non-existent college was void, though

¹ Bull v. Bull, 8 Conn. 47; Sawtelle v. Witham (Wis., 1897), 69 N. W. R. 72. Cf. Dye v. Beaver Creek Church (S. C., 1898), 26 S. E. R. 717.

² Minot v. Baker, 147 Mass. 348, 17 N. E. R. 889.

³ Appeal of Goodrich, 57 Conn. 275, 18 Atl. R. 49.

⁴ *Ante*, § 802.

⁵ Co. Lit. 55; 2 Black. Com., p. 296.

a college answering to the description employed shall subsequently be created by royal license.¹ But the general favor with which charitable gifts have been and are regarded by the courts, particularly the courts of equity, has brought about a radical change in this rule of law. The authorities now generally support the proposition that a devise to a charitable corporation which is *not in existence at the death of the testator*, but which is to be created *subsequently* by the legislature in accordance with the charitable plan expressly stated in his will, is not void because of indefiniteness of the beneficiary. But this rule must be taken with the limitation that the testator shall not have devised an interest in the legal title to the land to some person or persons to hold until the charitable institution shall come into existence, in such manner and on such terms that an illegal suspension of the power of alienation is created which is to endure for a longer period than is permitted by the rule against perpetuities.² Such devises of funds

¹ See *Cholmley's Case*, 2 Rep. 51a; *Lane v. Cowper*, Moor. 104; *Noe's Case*, Winch, 55; *Simpson v. Southward*, 1 Rol. R. 254, and the remarks of Judge Sharswood in the case of *Zeissweiss v. James*, 63 Pa. St. 465, where property was devised to an unincorporated society for the propagation of infidel teachings, with a proviso that it should be incorporated. The court, after stating that under the existing statutes, and in view of the aversion with which the propagation of infidelity was regarded by the law, it was extremely improbable that such a society would ever be incorporated, held the devise void as being too remote, comparing it to a devise of a possibility upon a possibility, and to a gift of a remainder to the heirs of a person unborn.

² *Milne v. Milne*, 17 La. (O. S.) 46; *Dascomb v. Martin*, 13 Atl. R. 838, 80 Me. 232, 233; *Nason v. Church*, 66 Me. 100; *Sewall v. Cargill*, 15 Me. 414; *Swasey v. American Bible Society*, 57 Me. 526; *Chase v. Stockett*, 72 Md.

235, 19 Atl. R. 761 (by act Md., 1883, ch. 249); *Longheed v. Dykeman's Baptist Church*, 12 N. Y. Supp. 207, 58 Hun, 364, 29 N. E. R. 249; *N. Y. American B. Soc. v. American Colonization Soc.*, 50 Hun, 194, 2 N. Y. Supp. 774; *In re Teed*, 59 Hun, 642, 12 N. Y. Supp. 642; *Dammert v. Osborn*, 140 N. Y. 30, 35 N. E. R. 407; *Pennoyer v. Wadhams*, 20 Oreg. 274, 25 Pac. R. 720; *In re Lewis' Estate*, 11 Pa. Co. Ct. R. 561; *In re Peper's Estate*, 154 Pa. St. 331, 25 Atl. R. 1058; *Appeal of Mercantile Library Co.*, 54 Pa. St. 331, 25 Atl. R. 1058; *Zimmerman v. Anders*, 6 Watts & S. (Pa.) 218; *Johnson v. Johnson*, 92 Tenn. 559, 565; *Dodge v. Williams*, 50 N. W. R. 1103, 46 Wis. 70; *Field v. Drew Theology Seminary*, 41 Fed. R. 371; *Hayes v. Pratt*, 13 Sup. Ct. 503, 147 U. S. 557. Cf. *German Prot. Home for Aged v. Hardie*, 43 La. Ann. 251, 9 S. R. 12. In the state of Maine, a gift to the first gospel minister who shall settle in A. was held to be valid. *Shapleigh v. Pillsbury*, 1 Me. 271.

or lands to persons named, which are to be *by them* devoted at some future time to the foundation and maintenance of charitable institutions, are not to be regarded as executory future gifts to the institutions which are to be created, but as present vested devises of the legal estate in the property mentioned, to the persons who are expressly or by implication made trustees. Such persons have a present vested title in the trust for the future charitable corporation, and the future corporation, when created, does not take the legal title to the property under the will of the testator, but by a conveyance of the property from the trustees named by him.¹ In those states where the common-law rule of perpetuities has been abolished, and where it is illegal to suspend the power of alienation for more than two lives in being, as in the case of New York, a devise to trustees to be at some future date conveyed to a corporation to be organized is invalid, if the duration of the trust is longer than two lives in being at the death of the testator. But in such states a devise which is to vest in a religious organization, after the termination of a life estate, is valid though the corporation was not in existence at the death of the testator, provided it became incorporated during the life of the life tenant.²

¹ Gould v. Taylor Orphan Asylum, 50 N. W. R. 422, 46 Wis. 106. A devise of a residue in trust after the payment of debts and pecuniary legacies, "for the purpose of founding and supporting, or uniting in the support of any institution that may be then founded, to furnish a retreat and home for disabled or aged and infirm and deserving American mechanics," is undoubtedly valid, and has been held so by the supreme court of the United States, though the corporation to which the trustees devoted the fund was not incorporated until after the death of the testator. Hayes v. Pratt, 18 Sup. Ct. 503, 147 U. S. 557.

² Longheed v. Dykeman's Baptist Church, 58 Hun, 364, 12 N. Y. Supp. 207, affirmed in 29 N. E. R. 249; Plymouth v. Hepburn, 57 Hun, 161, 10

N. Y. Supp. 817. In Iowa it seems that a devise to a corporation to be organized is invalid. Bond v. Home for Aged Women (Iowa), 62 N. W. R. 838. In Maryland a devise to a corporation to be incorporated in the future is valid by statute, *provided the will contains directions for incorporating the same*, but not otherwise. Yingling v. Miller, 77 Md. 104, 26 Atl. R. 491. A bequest in trust to a church, to use and apply the income therefrom for church purposes, will be upheld, and a trustee appointed to administer the trust, though such church at the time of the death of the testator and at the time of the probate of the will was an unincorporated body. St. Peter's Church v. Brown, 43 Atl. R. 642 (R. L., 1899).

§ 830. **The validity of charitable gifts to unincorporated and voluntary societies.**— By a well known and ancient rule of the common law, a gift or grant of land to an unincorporated society is void.¹ The grantor must name some definite and ascertainable person, either natural or artificial, who is capable of being seized of the legal title to the land. The grantee must be in existence, and must be some individual or corporation who is capable of having livery of seizin. By the action of courts of equity in both England and in the United States this rule is generally, though not universally, held inapplicable to devises and gifts for charities and for public purposes generally. In this country, in a very early case, a grant to the inhabitants of a town, being unincorporated, was held valid.² And this rule has been followed in nearly all of the states in which this question has arisen.³ Hence, we may safely say that charitable devises to the inhabitants of an unincorporated community, to clubs and unincorporated societies are not *per se* invalid, and that, if necessary, a trustee will be appointed.⁴

¹ *Ante*, § 829.

² *Pawlet v. Clark*, 9 Cranch (U. S.), 292.

³ *Williams v. Pearson*, 38 Ala. 299; *Chatham v. Brainard*, 11 Conn. 60; *American Bible Soc. v. Wetmore*, 17 Conn. 181; *McCord v. Ochiltree*, 8 Blackf. (Ind.) 15; *Byers v. McCartney*, 62 Iowa, 339, 17 N. W. R. 371; *Seda v. Huble*, 75 Iowa, 428, 430, 39 N. W. R. 685 (unincorporated church); *Preachers' Aid Soc. v. Rich*, 45 Me. 552; *Everett v. Carr*, 59 Me. 325; *Sohier v. St. Paul's Church*, 12 Met. (Mass.) 250, 561; *Sears v. Chapman*, 158 Mass. 400, 33 N. E. R. 604; *Washburne v. Sewall*, 9 Met. (Mass.) 280, 283; *Bartlett v. Nye*, 4 Met. (Mass.) 378, 379; *Burbank v. Whitney*, 24 Pick. (Mass.) 146; *Eutaw Place Church v. Shively*, 67 Md. 490, 10 Atl. R. 244 (to a Sunday school); *Ticknor's Estate*, 13 Mich. 44, 56; *Parker v. Cowell*, 16 N. H. 149; *Succession of Vance*, 39 La. Ann. 371, 2 S. R. 54; *Hadden v. Dandy*, 51 N. J. Eq. 154, 26 Atl. R. 464.

⁴ In New York the decisions are not harmonious. Some cases sustain the text; others wholly repudiate it. The following sustain it: *In re Bullock*, 6 Dem. Sur. 335; *McCartee v. Orphan Asylum*, 9 Cow. (N. Y.) 484; *Potter v. Chapin*, 6 Paige (N. Y.) 649, 650; *In re Owens*, 33 N. Y. Supp. 422, 24 N. Y. Civil Pro. R. 256; *Vanderbolgen v. Yates*, 3 Barb. Ch. (N. Y.) 242; *Hornbeck v. American B. Soc.*, 2 Sandf. Ch. 133; *Banks v. Phelan*, 4 Barb. 80. See *contra*, *Owens v. Missionary Society*, 14 N. Y. 380; *Downing v. Marshall*, 23 N. Y. 9. See also as sustaining the text, *McIntire v. Zanesville C. & M. Co.*, 9 Ohio, 203; *American Tract Soc. v. Atwater*, 30 Ohio St. 77; *Zimmerman v. Anders*, 6 Watts & S. (Pa.) 218; *Pickering v. S'iotwell*, 10 Pa. St. 23; *Appeal of Evangelical Association*, 35 Pa. St. 316; *Bethlehem v. Perseverance Co.*, 81 Pa. St. 445; *Dye v. Beaver Creek Church*, 26 S. E. R. 717; *Bates v. Taylor*, 28 S. C. 476, 6 S. E. R. 327; *Smith v. Nelson*, 18 Vt. 511; *Gib-*

In some of the states a devise to a voluntary or unincorporated society for charitable purposes is invalid. This is the rule in Minnesota,¹ Indiana,² Maryland,³ Tennessee,⁴ Texas,⁵ Wisconsin,⁶ and, according to the most recent cases, in the state of New York.⁷

A devise of land to a branch of the Salvation Army, which is an unincorporated voluntary association, whose membership is constantly in a fluctuating state, is invalid. But where a statute⁸ provides for the legal incorporation of unincorporated churches, the branch may, within a reasonable time, become incorporated and take land devised to it for religious purposes.⁹ And where a devise to an unincorporated society is void because of the incapacity of the society to take on account of its lack of corporate capacity, it cannot be validated merely because the property is given in trust for such society, nor can a court of equity appoint a trustee for such an unincorporated organization where the testator has given property to it di-

son v. McCall, 1 Rich. (S. C.) Law, 174; Burr's Ex'r v. Smith, 7 Vt. 241; Smith v. Nelson, 18 Vt. 511; Mong v. Roush, 29 W. Va. 119; Fadness v. Braunborg, 73 Wis. 257, 41 N. W. R. 84; Hopkins v. Grimes, 17 Sup. Ct. 401; Beatty v. Kurtz, 3 Pet. (U. S.) 583. A trust for a well known religious community, as the Society of Friends, has been held valid. Dexter v. Gardner, 7 Allen (Mass.), 243. In the case of Inglis v. Trustees of Sailors' Snug Harbor, 3 Peters (U. S.), 99, a trust created by a devise to the chancellor, mayor of New York, recorder and others (afterwards incorporated) for the purpose of founding a Home for Aged Seamen was held valid.

¹Society v. Moll, 51 Minn. 277, 53 N. W. R. 648. "To those members of the society, etc., now under my control and subject to my authority." Lane v. Eaton, 71 N. W. R. 1031 (Minn.).

²Grimes v. Harmon, 35 Ind. 246, where the gift was to "the Protestant

clergymen" of a certain town. But other cases in this state are *contra*.

³State v. Warren, 28 Md. 338. In this case the court said: "As a general rule it is clear that a bequest or devise to an unincorporated association is void, and it is only by virtue of that peculiar jurisdiction, exercised by courts of chancery in regard to charitable uses, that such bequests ever have been sustained."

⁴White v. Hall, 2 Coldw. (Tenn.) 77; Rhodes v. Rhodes, 88 Tenn. 637, 13 S. W. R. 590.

⁵Nolte v. Meyer, 79 Tex. 351, 15 S. W. R. 276, which was a case of a devise "to the German citizens comprising the neighborhood."

⁶Heiss v. Murphey, 40 Wis. 276; Ruth v. Oberbrunner, 40 Wis. 238.

⁷White v. Howard, 46 N. Y. 144; Owens v. Missionary Society, 14 N. Y. 380; Downing v. Marshall, 23 N. Y. 366.

⁸Minn. Gen. St. 1894, ch. 34, tit. 4

⁹Lane v. Eaton (Minn.), 71 N. W. R. 1031. See also Minn. Gen. St. 1894, ch. 43, sec. 4274.

rectly.¹ A devise to a Sunday school may be invalid, at least in those jurisdictions where it is held that testamentary gifts to unincorporated associations are invalid. But in recent cases, where a testator gave money to an incorporated church "to be applied to the Sunday school belonging or attached to it," and it was shown that the school was an integral part of the church, the gift was upheld as sufficiently certain as respects the beneficiary.²

§ 831. **Misnomer in the case of gifts to charitable institutions.**— If the description of a charitable institution, which is a legatee in the will, accurately fits one claimant in every particular, it is never permissible to endeavor to prove by parol evidence that another institution claiming it, which it does *not accurately describe*, was intended by the testator.³ On the other hand, the fact that no charitable institution is in existence which, by its legal and corporate name, answers *in every particular* to the description of the charitable institution which is named as a legatee in the will, never *alone*, in modern times at least, renders the legacy void for uncertainty. If the legatee is inaccurately named or imperfectly described, and the property disposed of is claimed by several institutions, no one of which answers in every particular to the description, but two or more of which answer in one or more particulars, it is the duty of the court to construe the will in order to ascertain which corporation was intended. The court has a right to the aid of parol evidence under these circumstances, as well as the light which may be afforded by the context; and if, with these aids, the court is able to ascertain which charitable institution of several was intended, the misnomer will not defeat the gift.⁴ As tending to identify the corporation where a

¹ Rhodes v. Rhodes, 88 Tenn. 637, 13 S. W. R. 590. Cf. Nance v. Buzby (Tenn.), 18 S. W. R. 874; Seda v. Huble, 75 Iowa, 429, 39 N. W. R. 685.

² Eutaw Place Baptist Church of Baltimore City v. Shively, 67 Md. 493, 10 Atl. R. 244; Conklin v. Davis, 63 Conn. 377, 28 Atl. R. 537.

³ Tucker v. Seaman's Aid Society, 7 Met. (Mass.) 188; In re Jeane's Estate, 3 Pa. Dist. R. 314, 34 W. N. C. 190. See also *post*, § 910.

⁴ In re Gibson, 75 Cal. 329, 17 Pac. R. 438; Bristol v. Orphan Asylum, 60 Conn. 472 (a gift to the "Canandigua Orphan Asylum," taken by the "Ontario Orphan Asylum"); Crossgrove v. Crossgrove, 38 Atl. R. 219, 69 Conn. 416; Ayres v. Mead, 16 Conn. 291; American B. Soc. v. Wetmore, 17 Conn. 181; Goodrich's Appeal, 57 Conn. 275, 18 Atl. R. 49; Doughten v. Vandever, 5 Del. Ch. 51 (devise to "the Orphan Asylum of Philadelphia," the

devise is claimed by two or more institutions, none of which answers in its corporate name precisely to the phraseology of the will, it may be shown that the testator knew of the existence of one of the societies, though he may not have known its corporate name.¹ The fact that he received the report of the society shortly before the execution of the will;² that he had

"Widows' Asylum," and the "Marine Society," taken by the "Orphan Society of Philadelphia," "Indigent Widows' and Single Women's Society" and the "Pennsylvania Seamen's Friends Society"); *Bradley v. Rees*, 113 Ill. 332; *Decker v. Decker*, 121 Ill. 341, 12 N. E. R. 750; *Women's Union Miss. Society v. Mead*, 131 Ill. 33; *Craig v. Sechrest*, 54 Ind. 420; *Preachers' Aid Soc. v. Rich*, 45 Me. 552; *Howard v. American P. Soc.*, 49 id. 288, 297; *Hazeltine v. Vose (Me.)*, 14 Atl. R. 733; *Winslow v. Cumming*, 3 Cush. (Mass.) 358; *Minot v. Orphan Asylum*, 7 Met. (Mass.) 416; *Sutton v. Cole*, 3 Pick. (Mass.) 232; *Trustees v. Peaslee*, 15 N. H. 317 (devise to "Franklin Seminary of Literature and Science, Newmarket," to "trustees of the South Newmarket Methodist Seminary"); *Smith v. Kimball*, 62 N. H. 606; *Society v. Hatch*, 48 N. H. 393; *Chappell v. Missionary Society*, 3 Ind. App. 356; *Moore v. Moore*, 50 N. J. Eq. 554, 25 Atl. R. 413; *Baldwin v. Baldwin*, 3 Halst. (N. J.) Eq. 211; *Hornebeck v. Amer. Bible Soc.*, 2 Sandf. (N. Y.) Ch. 133 (in this case the gift was "to Am. Bible Soc. Tract, Synods Board of Missions Domestic Missions, N. Y. Colonization and Seamen's Friends"); *Banks v. Phelan*, 4 Barb. (N. Y.) 80; *Lefevre v. Lefevre*, 59 N. Y. 434; *Kimball v. Chappell*, 18 N. Y. S. 80, 27 Abb. N. C. 437; *Wetmore v. N. Y. Institute for the Blind*, 3 N. Y. Supp. 179; *Gray v. Missionary Society*, 2 id. 878; *Sheldon v. Chappell*, 47 Hun, 59; *Tilley v. Ellis (N. C.)*, 26 S. E. R. 29; *Newell's Appeal*, 24 Pa. St. 197 (gift to "trustees

who hold the funds of the Theol. Sem. at Princeton," given to "trustees of the Theological Seminary of the Presbyterian Church at Princeton"); *Wood v. Hammond*, 16 R. I. 98, 17 Atl. R. 324; *Cady v. Hospital*, 17 R. I. 207, 21 Atl. R. 365 (a devise to the "Children's Nursery," given to the "Rhode Island Children's Hospital and Nursery"); *Peckham v. Newton*, 4 Atl. R. 758, 15 R. I. 321 (a gift to "Home for the Aged in Newport" to the "Townsend Aid for the Aged"); *Fierson v. Genn. Ass. Pres. Ch.*, 7 Heisk. (Tenn.) 683; *Button v. American T. Soc.*, 23 Vt. 336; *McAllister v. McAllister*, 46 Vt. 272; *Vermont Baptist State Convention v. Ladd*, 9 Atl. R. 1 (Vt.) (a devise to the "Vermont State Convention" given to the plaintiff); *The General Ass. Pres. Ch. v. Guthrie*, 86 Va. 125, 10 S. E. R. 318; *University v. Tucker*, 31 W. Va. 621, 8 S. E. R. 410; *Ross v. Kiger (W. Va.)*, 26 S. E. R. 193; *Webster v. Morris*, 66 Wis. 366, 379, 381; *Kilvert's Trusts*, L. R. 12 Eq. (1871), 183; *Alchin's Trust*, L. R. 14 Eq. 230 (where a gift to the K. County Hospital was divided between two hospitals as nearly answering the description); *Attorney-General v. Rye*, 1 J. B. Moo. 267, 7 Taunt. 546; *Queen's College v. Sutton*, 12 Sim. 521; *Bradshaw v. Thompson*, 2 Y. & C. C. C. 295; *Wilson v. Squier*, 1 id. 654; *Smith v. Ruger*, 5 Jur. (N. S.) 905.

¹ *Woman's Union Missionary Soc. v. Mead*, 131 Ill. 83, 23 N. E. R. 603; *Howard v. American Tr. Soc.*, 49 Me. 296; *Button v. Society*, 23 Vt. 336.

² *Wetmore v. Institution*, 3 N. Y. Supp. 179.

very frequently expressed an interest in its work,¹ and that he had stated that he would leave a legacy for the cause represented by it;² that he had been one of the founders of the society or one of its officers;³ and had been, during his life, either a regular or an occasional subscriber to its support;⁴ and that the church to which he belonged, or which he attended, took up collections for it at regular intervals, is relevant.⁵

Where the will contained a direction to divide the residue equally between "the Board of Foreign and the Board of Home Missions," and it appeared that several different religious denominations have such boards, parol evidence was received to show that the testator meant those of the Presbyterian church. It was permissible to prove that he was an elder of the Presbyterian church, that he had taken special interest in the work of such boards, and had contributed to it but not to other foreign or home mission work. The court also took into consideration that in another clause of the will he had left money to the Presbyterian church.⁶ So, where several societies claimed a bequest to "the Sailors' Home in Boston," and there were several Homes, one of which had been partly maintained by the Baptist church, it is relevant to show that the testator was prominent in the Baptist church, knew of the work carried on by this denomination in behalf of the sailors, and was interested in a Baptist church which was represented in the management of the society in question.⁷

¹ Dutton v. American Tract Soc., 23 Vt. 349; General Assembly v. Guthrie, 86 Va. 125, 10 S. E. R. 318.

² Wetmore v. Institution, *supra*.

³ Woman's Union Miss. Soc. v. Mead, *infra*; Riker v. Leo, 1 N. Y. S. 128, 133 N. Y. 519, 30 N. E. R. 598.

⁴ Woman's Union Miss. Soc. v. Mead, 131 Ill. 33, 23 N. E. R. 603; Field v. Van Wyck, 27 S. E. R. 46; Tallman v. Tallman, 23 N. Y. Supp. 734, 3 Misc. R. 465; American Bible Soc. v. Wetmore, 17 Conn. 186; Wood v. Hammond, 16 R. L. 98, 17 Atl. R. 324; In re Lennig, 154 Pa. St. 209, 25 Atl. R. 1049; Kilvert's Trust, L. R. 7 Ch. 170.

⁵ Howard v. American Peace Soc., 49

Me. 288; Tallman v. Tallman, *supra*; Bristol v. Ontario Orphan Asylum, 60 Conn. 472, 22 Atl. R. 848; Chappell v. Missionary Soc., 3 Ind. App. 356, 29 N. E. R. 924.

⁶ Gilmer v. Stone, 7 S. Ct. 689, 120 U. S. 586.

⁷ Faulkner v. National Sailors' Home, 155 Mass. 458, 29 N. E. R. 645. The rule in England is that where a bequest for charitable purposes is claimed by several institutions, none of which precisely corresponds to the description in every particular, that the property shall be equally divided among them. Waller v. Childs (1765), Amb. 524; In re Alchin's Trusts, L. R. 14 Eq. 280; In re So-

§ 832. Charitable bequests to executors or trustees with a delegation of power to select the institutions or objects which are to be benefited.—In most of the states, as well as in England, the rule is settled that the testator may delegate to others the power of selecting those corporations or persons

ciety, 2 Kee. & J. 615; *Bennett v. Hayter*, 2 Beav. 81, 84, in which case the bequest was for the benefit of "poor dissenters." As there were three sorts of dissenters in England at that time, Baptists, Presbyterians and Independents, the court ordered the fund to be divided equally among them. "A misnomer or misdescription of a legatee or devisee, whether a natural person or a corporation, will not invalidate the provision nor defeat the intention of a testator, if, either from the will itself or evidence *dehors* the will, the object of the testator's bounty can be ascertained. No principle is better settled than that parol evidence is admissible to remove latent ambiguities; and where there is no person or corporation in existence precisely answering to the name or description in the will, parol evidence may be offered to ascertain who was intended by the testator. A corporation may be designated by its corporate name, or by the name by which it is usually or popularly called and known, by a name by which it was known and called by the testator, or by any name or description by which it can be distinguished from every other corporation; and when any but the corporate name is used, the circumstances to enable the court to apply the name or description to a particular corporation and identify it as the body intended, and to distinguish it from all others and bring it within the terms of the will, may in all cases be proved by parol. . . . As said by the court in *Minot v. Curtis*, 7 Mass. 441, 'there is no reason why corporations may

not be known by several names as well as individuals,' and if so, and named in a grant or devise by any one of its recognized names, it cannot be said that the name is wholly mistaken. The ambiguity arises only from the fact that the corporation has and bears two or more names. The corporate or charter name may be wholly mistaken or unknown to the testator, but if he designates it by some other name by which it is known and can be identified, the will must have effect according to the intention of the testator. A mistake in the name is not fatal so long as the testator sufficiently indicates the institution or individual intended." Remarks of Allen, J., in *Lefevre v. Lefevre*, 59 N. Y. 434, 440. The fact that a corporation named as a legatee for charitable purposes has changed its name before the execution of the will does not invalidate the bequest, particularly where the change of name is not known to the testator. The evidence must show that, whatever may be its name, the institution claiming the bequest is the one intended by the testator. *Elnell v. Universalist General Convention*, 76 Tex. 514, 13 S. W. R. 552; *Trustees, etc. Methodist Seminary v. Peaslee*, 15 N. H. 317. In the latter case the testator, a Methodist clergyman, bequeathed money to the Franklin Seminary of Literature and Science at Newmarket, N. H., which was the only public school in the town, and was under the control of the Methodist church. Before the execution of the will the name of this institution had been changed to "The Trus-

that are to be the recipients of his bounty in the case of a charitable gift. The cases which have arisen under this head of charitable trusts may be divided into two classes. *First*, where the charitable purpose stated in the will is reasonably clear, definite and certain, though the testator has left it to his executors to select the institution by which his purpose is to be carried out, and, at the same time, has expressly directed that his intention shall be carried out through and under the control of some existing charitable corporation. Such cases arise, for example, where the testator gives money to a Roman Catholic bishop to be "used for the Roman Catholic institutions of his diocese,"¹ or directs the executors of the will to distribute a residue "among charitable institutions similar to those mentioned by me in my will,"² or directs them to "distribute money among such charitable institutions as they may deem proper,"³ or "to divide the remainder of the estate among such charitable institutions in a certain city as they shall deem most worthy."⁴ Such gifts are undoubtedly valid. The objection that they are too indefinite, in that they do not point out the beneficiary with sufficient certainty, is of no force, as the rule *id certum est quod certum reddi potest* would apply. The general charitable purpose of the testator is clear and definite, and, having thus clearly defined his intention, he has the power to leave to his executor the selection of one or more out of a necessarily limited number of charitable institutions or corporations which are to receive the property disposed of. The question in all these cases where the executor is empowered to select the institution is not as to the indefiniteness of those who are to be the final beneficiaries, the ultimate *cestuis que trustent*, but what corporation is to receive the legal title which

tees of the South Newmarket Methodist Seminary." The court said: "The evidence tends strongly to show that he did not know that the name of the school had been changed. He inquired how the school at South Newmarket prospered, and often spoke about it. These facts clearly show that the testator had in his mind the school which was afterwards incorporated by its present name. What its peculiar designa-

tion was must have been indifferent to him, for it was the institution, by whatever name it was known, which he desired to patronize and benefit."

¹ *Tichenor v. Brewer's Adm'r* (Ky., 1896), 33 S. W. R. 86.

² *Rhode Island Trust Co. v. Olney*, 13 Atl. R. 118.

³ *In re Kinike's Trust*, 155 Pa. St. 101, 25 Atl. R. 1016.

⁴ *Howe v. Wilson*, 91 Mo. 45, 3 S. W. R. 390.

the executor holds for the benefit of some one or more institutions to be named.

The executor has no functions to perform in carrying out the charitable intention of the testator except to convey the legal title to some existing charitable corporation which he may select. He has no right, and is under no obligation, to arrange a plan to carry out the charitable intention of the testator, or to create or supervise the means and methods by which the bounty of the testator is to reach and benefit any indefinite class of persons. As soon as he has conveyed the property to an institution which is, by its character and the scope of the work in which it is engaged, within the class of institutions designated by the testator, his duty is ended, and he has no right, nor is he obligated, to go further and inquire into the application of the property devised, by the charitable corporation to which he has given it. So in numerous cases the validity of the power of a trustee or an executor to select a charitable corporation out of several has been sustained.¹

¹ *Quinn v. Shields*, 62 Iowa, 129, 140, 146, 17 N. W. R. 437; *Wells v. Doane*, 8 Gray (Mass.), 201; *Brown v. Kelsey*, 2 Cush. (Mass.) 243; *Saltonstall v. Saunders*, 11 Allen (Mass.), 446; *Universalist Society v. Fitch*, 8 Gray (Mass.), 421; *Powell v. Hatch*, 100 Mo. 592, 14 S. W. R. 49; *Sickles v. New Orleans*, 80 Fed. R. 868; *Claypool v. Norcross*, 42 N. J. Eq. 545, 9 Atl. R. 112; *Hesketh v. Murphy*, 35 N. J. Eq. 530, 535; *Weber v. Bryant* (Mass.), 37 N. E. R. 203; *Fairchild v. Edson*, 25 N. Y. Supp. 937, 5 Misc. R. 451; *In re Kinike's Estate*, 25 Atl. R. 1016, 155 Pa. St. 101; *Appeal of Lancaster Trust Co.*, 25 Atl. R. 1016, 155 Pa. St. 101; *Rhode Island Hospital Trust Co. v. Olney* (R. L.), 13 Atl. R. 118. In New York a different rule is recognized. In that state, in the celebrated case of the will of the late Samel J. Tilden, reported *Tilden v. Green*, 28 N. E. R. 880, 130 N. Y. 29, 29 N. E. R. 1033, affirming 7 N. Y. Supp. 382, it was decided that a bequest to trustees of a fund to be applied to "such

charitable, educational and scientific purposes as in the judgment of my executors will render said residue of my property most widely and substantially beneficial to mankind," was void. The court held that such a charitable trust was void not only because indefinite as to its objects, but because indefinite as to its purpose as well. So also in *Amherst College v. Ritch*, 151 N. Y. 282, the court, construing the will of Mr. Fayerweather, who devised a large part of his residuary estate to trustees, privately instructing them before his death that he wished the property given to them to be devoted to certain charitable purposes which he mentioned to them, refused to support this secret trust. If the testator gave a legacy absolutely expecting it to be applied for certain purposes, but received no promise, express or implied, from the legatee, equity will not raise a secret trust. The rule would be otherwise where the testator was induced to make a will, or to refrain

The second class of cases comprises those where a discretionary power to select the objects of the charity is delegated, but in which the charitable purpose of the testator is so vaguely defined, or so indefinitely stated, that the executor in exercising his discretion finds very little in the will to guide him in selecting any particular charitable purpose; and where at the same time the testator wholly fails to point out any particular charitable institution, the means by which or manner in which his charitable plans are to be put into effect, except perhaps in the most general and indefinite way. The general rule, that it is an absolutely essential requisite of a charitable trust that the ultimate beneficiaries shall be indefinite, is admitted. And where the testator has omitted to point out the means by which his gift is to reach those for whom it was meant, the trustee may, either with or without the aid of the court of equity, devise some plan in order that his intention may not fail. If, therefore, the legal title is vested in the executor or in a trustee on whom the testator has conferred a general discretion to carry into effect his charitable purposes, albeit such purposes are framed in vague and ambiguous language, the court will lend its aid by declaring such a disposition to be valid and by enabling the trustee to carry it out as near as possible within the meaning of the testator.¹ Thus, where the testator bequeathed his property "to be kept in reserve for *general charitable purposes* in a liberal way," not *mentioning any particular institutions or class of objects*;² where he bequeathed a sum of money to the executors "for the support and *education of such orphan children in a county* as may, in the judgment of the executors, be most deserving;"³ or gave money "for the furtherance and promotion of the cause of piety and good morals, or in aid of objects of benevolence and charity, public or private, or temporary, or for the education of deserving youths;"⁴ for the establishment of a public library

from altering one already made, by a promise made by a legatee that he would apply the legacy for the benefit of certain persons. And the same rule applies where the heir, or one of the next of kin of a deceased person, by promises persuaded him not to make a will. *Amherst College v. Ritch*, 151 N. Y. 282, 323. See § 153.

¹ *Dye v. Beaver Creek* (S. C.), 26 S. E. R. 717.

² *Claypool v. Norcross*, 42 N. J. Eq. 545, 9 Atl. R. 112.

³ *Sawtelle v. Witham*, 94 Wis. 412, 69 N. W. R. 72.

⁴ *Saltonstall v. Sanders*, 10 Allen (Mass.), 446.

and to found a protectory for poor boys;¹ to purchase a site for an opera house and orphan asylum and to build the same;² for foreign missionary purposes;³ "to the cause of Christ for the benefit of true evangelical piety and religion to such societies and in such proportions as trustees may think proper;"⁴ for the purpose of propagating the teaching of religion according to the form of government and book of discipline of the Presbyterian church;⁵ to be divided among such benevolent, charitable and religious institutions as my executors may select;⁶ for the benefit of the members of the church in the discretion of the presiding bishop, whether for public schools, parks, or otherwise;⁷ or gave a sum of money in trust to the county commissioners for the establishment of a home, the trustees "to be the judges of what is necessary;"⁸ for the benefit of poor orphans, to be selected by the county court;⁹ for such charities as shall be deemed most useful by the executors;¹⁰ "for the promotion of piety and religion, to be applied and distributed by certain trustees," in such divisions and to such societies as they may think fit "and proper;"¹¹ to promote education among a class of beneficiaries in any mode that they may think best;¹² conferred a power upon the bishop of the diocese "to sell all his real estate and to dispose of the proceeds for the church, or for education, as he in his wisdom may think proper or legal;"¹³ made a bequest of the residuary estate to constitute a fund, the income of which was to be applied to the relief of the poor and unfortunate in private charity, and to others who might, in the judgment of the sisters of the testator, be worthy of relief;¹⁴ for the benefit of poor churches in his city or vicinity;¹⁵ a bequest of money "to carry out the intention

¹ Duggan v. Slocum, 83 Fed. R. 244.

² Barkley v. Donnelly (Mo.), 19 S. W. R. 305.

³ Board of Foreign Missions, etc. v. Culp, 25 Atl. R. 117, 151 Pa. St. 467, 81 N. C. 135.

⁴ Going v. Emery, 16 Pick. (Mass.) 107.

⁵ Succession of Auch, 89 La. Ann. 1048, 3 S. R. 227.

⁶ In re Murphy's Estate, 39 Atl. R. 70 (Pa., 1898); Appeal of Kurtz, Id.

⁷ Staines v. Burton, 53 Pac. R. 1015.

⁸ Board Com'rs Rush County v. Dinwiddie (Ind.), 37 N. E. R. 795.

⁹ Moore v. Moore, 4 Dana (Ky.), 354.

¹⁰ Wells v. Doane, 3 Gray (Mass.), 201.

¹¹ Going v. Emery, 16 Pick. (Mass.), 107.

¹² Treat's Appeal, 30 Conn. 113.

¹³ Lepage v. McNamara, 5 Iowa, 146.

¹⁴ Bullard v. Chandler, 21 N. E. R. 951, 149 Mass. 532.

¹⁵ McAlister v. Burgess (Mass.), 37 N. E. R. 759.

of the testator to provide for the education of two young men for the ministry;”¹ a residuary gift “for the advancement and benefit of the Christian religion, to be applied as in my executors’ judgment” will best promote the object named;² a gift to trustees for the maintenance and education of poor white citizens of this county to keep them from being carried to the poor-house,³ has been held valid. A valid trust of this description requiring the trustee to distribute the fund among charitable institutions is imperative and must be executed within the period named by the testator, or, if no period is named, within a reasonable time, according to the peculiar circumstances of each case. If the trustees refuse or unreasonably neglect to execute the trust, the court of equity will compel them to act or remove them and appoint others in their place.⁴

On the other hand, bequests to an executor to be expended for charity *in his discretion*;⁵ a gift to trustees with directions to pay it over to some Presbyterian institution in Baltimore, as *they may determine*, for charitable or religious purposes;⁶ a gift to a municipal corporation for the benefit of the poor within its limits;⁷ or for the benefit of poor orphans *to be selected* by the trustees;⁸ or for “the education and support of orphan children in such way and manner *as A. may select*;⁹” in trust for such charitable institutions as the majority of the *trustees shall select*;¹⁰ to executors to be by them given to such charitable societies for relieving the indigent and comfortless *as they may select*;¹¹ or to be applied in their best judgment for charitable and religious purposes for promoting the Christian religion;¹² a legacy “to be applied as my executors *may think proper ob-*

¹ Field v. Drew Theological Seminary, 41 Fed. R. 375.

² Miller v. Teachout, 24 Ohio St. 525. A devise to an executor to be given certain charities “in such sums and proportions as, in their discretion, they may think proper,” and, if they thought best, to pay a portion of it at such times and in such amounts as they may think proper to “worthy poor girls,” is void for uncertainty. Wheelock v. American Tract Soc. (Mich., 1896), 66 N. W. R. 955.

³ State v. Griffith, 2 Del. Ch. 392.

⁴ Sawtelle v. Witham, 94 Wis. 412,

415, 69 N. W. R. 72; Osborne v. Gordon, 86 Wis. 98.

⁵ Schmucker v. Reel, 61 Mo. 592.

⁶ Gambel v. Trippe, 75 Md. 252, 23 Atl. R. 461.

⁷ Wilderman v. Baltimore, 8 Md. 551.

⁸ Miller v. Atkinson, 63 N. C. 537.

⁹ Rose v. Hatch, 125 N. Y. 427, 26 N. E. R. 467.

¹⁰ Butler v. Green, 16 N. Y. Supp. 888, 9 N. Y. S. 890.

¹¹ Beekman v. Bonsor, 23 N. Y. 298.

¹² Dulany v. Middleton, 72 Md. 67.

jects according to the scriptures, the greater part to missionary purposes;”¹ a residuary gift “to some disposition thereof which my executors may consider as promising most to benefit the town and trade of A. in such manner as appears to them to yield the greatest good;”² and a bequest to be distributed among charitable institutions in Pennsylvania as executors’ may deem most beneficial to mankind, “so that part of the colored population in each of the said states shall partake of the benefits thereof,”³ have been held invalid.⁴

§ 833. The validity and performance of conditions attached to charitable gifts.—The testator may attach a condition to his devise or bequest for charitable purposes, upon the performance of which it will vest in the trustee, or by the non-performance of which it will be defeated. The rules elsewhere explained regulating testamentary gifts upon condition are in general applicable.⁵ If the condition is precedent, the performance of which is required before the legacy shall vest, a substantial compliance is necessary. Thus, where a testator devises land to a college upon condition that it should change its name prior to his decease, the devise is void where the beneficiary has not in fact changed its name.⁶ If the condition, being precedent, is so indefinite that it cannot be performed, the devise which is to vest upon its performance will be void.⁷ A condition that a sum of money is to be paid to a hospital by a trustee appointed in the will, in case the Episcopal churches in a city shall prove to his satisfaction that they would permanently support it as a church hospital, is not void for indefiniteness.⁸

¹ *Bridges v. Pleasants*, 4 Ired. (N. C.) Eq. 26.

² *Wheeler v. Smith*, 9 How. (U. S.) 55.

³ *Fontain v. Ravenal*, 17 How. (U. S.) 369.

⁴ In Louisiana a testator cannot leave the selection of a residuary legatee to the discretion of his executor. *Burke's Succession* (La., 1899), 25 S. R. 387.

⁵ See § 479 et seq.

⁶ *Merrill v. Wisconsin Female College*, 74 Wis. 415, 419.

⁷ *Beecher v. Yale*, 45 N. Y. Supp. 622.

⁸ *Atwater v. Russell*, 49 Minn. 57, 51 N. W. R. 629; *In re Robinson*, 61 L. J. Ch. 17. A legacy of an amount to be paid to a charitable institution upon its raising an amount as a condition precedent is not invalid, and, on the performance of the condition, the legacy will vest in the legatee. *Penick v. Thom's Trustee*, 90 Ky. 665, 14 S. W. R. 830.

The testator may impose as a condition upon the charitable bequest that a scheme shall be devised to carry out his intention by certain persons named by him in his will before the money bequeathed shall be paid over. And he may also require that the scheme thus devised shall be certified as practicable and seemingly certain of success by a person in whom he has confidence and upon whom he has conferred the power to certify to these facts.¹

The testator may also annex a condition to his gift, that, on the happening of an event, the fund given to the first legatee shall go over to others;² as, for example, where the testator provided that, if the charity was ever discontinued, the legacy should go to another institution.³ Every gift of land or money for charitable purposes is upon the implied condition that it shall be devoted perpetually, by the corporation or its successors, to a specific charitable purpose which is pointed out by the testator. It is the general rule in America that upon breach of this implied condition, upon which all charitable gifts of land are held, the

¹Appeal of Seagrave, 125 Pa. St. 363, 17 Atl. R. 412. In this case a residue was left to be paid to the trustees of a hospital which was to be organized within five years, the fund, in the language of the testator, to be only a nucleus for the establishment and maintenance of the institution named. He further directed and empowered certain ecclesiastical authorities to devise a scheme for the proposed hospital and to appoint trustees to carry the scheme out. He also stated that, as he did not wish his estate to be wasted in an ineffectual attempt to establish the institution named, and as he knew that other subscriptions for the same purpose would be required, he did not wish the bishop and the conference, which were authorized to formulate the scheme, to call for the payment of the money unless the plan devised "should be practical and seemingly certain of success." When trustees had been appointed, land purchased sufficient for the erection of one building, and a very large sum of

money pledged and collected from third persons, it was held that the conditions had been complied with, and that the fund bequeathed should be paid to the trustees named, though no buildings had in fact been begun, and though all the money subscribed had not actually been collected from the subscribers.

²Parish of Christ Church v. Trustees of Donations, etc., 67 Conn. 554, 35 Atl. R. 552.

³Wood v. Hammond, 16 R. I. 98, 17 Atl. R. 324. In New York it has been held that a condition that a charitable institution, such as a church, shall pay an annuity out of the legacy given to it, is not invalid, though under its charter the institution is not authorized to pay annuities. Booth v. Baptist Church, 126 N. Y. 215, 28 N. E. R. 238. See also Mills v. Davison (N. J. Eq.), 35 Atl. R. 1072, as to what language attached to a charitable gift forbidding alienation by sale or mortgage will constitute a condition.

land itself reverts to the donor or his heirs at once, or, in the case of a devise in the will of the donor, to his residuary devisee.¹ This is the general rule in the case of a diversion of charitable funds to purposes contrary to the intention of the donor or testator. But where there is no intentional diversion of a charitable gift, and it is in danger of failing, merely because the original institution to which it was given is going out of existence, a court of equity will interfere, and, in the manner pointed out in the next section, will endeavor to continue the application of the bounty of the testator.

§ 834. The effect of the consolidation, division or dissolution of a corporation which is the donee of a charitable gift. The case of a gift to a charitable institution, which has ceased to exist prior to the death of the testator, affords an opportunity for a construction *cy pres* in determining the destination of the fund given by the testator. The English chancellors of the time of Charles II. would have felt little, if any, hesitation in applying the bequest which had been given to a defunct corporation, to another charitable purpose somewhat analogous. But the modern English cases refuse to invoke the aid of the *cy pres* doctrine where the bequest is to a particular charitable institution *by name*; and where the institution has ceased to exist prior to the death of the testator, the legacy will lapse and go to the residuary legatee or to the next of kin.² So in America, if a charitable corporation to which the testator has given property is dissolved *prior to his death*, and its property is transferred to another corporation which is carried on for an entirely different charitable purpose, the legacy lapses.³

¹ Mott v. Danville Seminary (Ill.), 21 N. E. R. 927; Wardens v. Attorney-General, 164 Mass. 188, 41 N. E. R. 231; Appeal of Gumbert, 110 Pa. St. 496, 1 Atl. R. 437; Moseman v. Heitshousen (Neb., 1898), 69 N. W. R. 957; Campbell v. City of Kansas, 102 Mo. 326, 13 S. W. R. 897; Seitz v. Seitz (Pa.), 17 Atl. R. 229; Schlessinger v. Mallard, 11 Pac. R. 728, 70 Cal. 326; *ante*, § 47.

² Clark v. Taylor, 1 Drew. 642; Russell v. Kellett, 3 Sm. & Gif. 264; Marsh v. Means, 5 Weekly R. 815; Fisk v. Attorney-General, L. R. 4 Eq. 521; Langford v. Gowland, 3 Gif. 617, 9

Jur. (N. S.) 12; Hayter v. Trego, 5 Russ. 113; In re Ovey, L. R. 29 Ch. Div. 560; Broadbent v. Barrow, Id.; Rymer v. Stanfield, 12 Reports, 112; Id., (1895) 1 Ch. 19.

³ Merrill v. Hayden, 86 Me. 133, 135, 29 Atl. R. 949; Simmons v. Burrell, 28 N. Y. S. 625, 8 Misc. R. 388; In re Cowen's Estate, 4 Pa. Dist. R. 435. So where a testatrix devised her residuary estate to a school district to build a school, and the school district was, after the execution of the will, but prior to her death, abolished by statute, the residuary gift lapsed and

The dissolution or extinction of a charitable corporation, in which property devised by the testator *has become vested*, does not always effect a reversion of the property to the heirs of the testator, in the absence at least of an express condition to that effect. The court of equity will arrange that the property of the defunct institution shall be applied to a purpose which is similar in its nature to that of the original institution, through some other existing institution.¹ Thus, the proceeds of the sale of the property of an orphan asylum which had been dissolved may, on payment into court, be devoted to the aid of a society for the prevention of cruelty to children in preference to a dispensary or hospital.² Where two corporations are created by the legislature to succeed to the powers, duties and rights of another, to which a valid charitable gift has been made, the property will, on the death of the testator, be divided between the two bodies in proportion to the shares which they take by the statute in the property of the non-existing corporation.³

§ 835. **Definitions of the words pointing out the area within which charitable funds are to be distributed.**—The question arises in construing a gift which is to be distributed among charitable institutions located within a territorial area mentioned by the testator, whether he speaks in view of the condition of affairs existing at the date of the will, or whether he refers to the date of his death.⁴ If he directs money to be distributed among the poor of the town of A., and, subsequently to the execution of the will, the town of A. is subdivided, or is consolidated with another town, the inquiry is what class of persons was intended? It has been said that, where the testator makes a gift *directly to the city or town in which he resides*, or to *its poor*, he *may* have had in contemplation that at some future date it would possibly be expanded

descended to her heirs as intestate property. *Brooks v. City of Belfast*, 38 Atl. R. 222 (Me., 1898).

¹ *In re Seller's Chap. M. E. Church*, 27 W. N. C. 383, 21 Atl. R. 145; *Jones v. Renshaw*, 130 Pa. St. 327, 18 Atl. R. 651; *In re Vanhorne*, 18 R. L. 389, 28 Atl. R. 341; *In re Slevin*, (1891) 2 Ch. 236.

² *Attorney-General v. Pauline Home*, 141 Pa. St. 537, 21 Atl. R. 661.

In case the original institution which has suspended subsequently resumes operation, the custody and administration of the fund may be restored to it. *Barnard v. Adams*, 58 Fed. R. 313.

³ *Diocese of East Carolina v. Diocese of North Carolina*, 102 N. C. 442, 9 S. E. R. 310.

⁴ See *ante*, § 14.

and extended so as to include within its limits persons who were not its residents when the will was made. Hence, where trustees were given a discretion to distribute money *to the poor of A.*, they are not confined to the limits of the town as it *existed at the date of the will*, but may take in territory which had been added to it subsequently.¹ In the United States the boundaries of a municipal corporation are almost invariably designated explicitly by its charter, and generally no confusion arises in determining what lands shall constitute the city. But in England, and perhaps in some exceptional cases in this country, difficulties in construing a gift to hospitals or other charitable institutions of a city might arise. Thus the word "London," in its popular sense, has a fluctuating meaning. Where the testator gave a bequest to be divided among the "*hospitals of the city of London*," it is clear that he did not mean to use the word in its technical sense, as meaning only the metropolitan district, by which Kensington and Westminster would be excluded, nor could he have meant the territory within the bills of mortality, which were purely arbitrary, excluding a large part of the metropolis itself. The court, after some hesitation, finally adopted a definition, which it confessed was extremely indefinite, that by the city of London, the old city, with Westminster, Southwark, and as much ground in Middlesex and Surrey as was built on or contiguous thereto, and within call, was meant.²

§ 836. Procurement of charitable bequest by unfair means, fraud or undue influence.—A charitable gift, in other respects valid, may be set aside because the testator was induced to execute it by fraud or undue influence. The general principle at the basis of the rule, that undue influence invalidates a legacy procured by it, is applicable to charitable gifts. It is not necessary that a person exercising the undue influence shall desire or succeed in procuring a benefit for himself only.

¹ McIntire v. Zanesville, 17 Ohio St. 352, 363; Zanesville Canal, etc. Co. v. Zanesville, 20 Ohio, 483.

² Wallace v. Attorney-General, 83 Beav. 384, 392. At the present writing, nearly two years after the consolidation of the numerous cities, towns and villages which now con-

stitute the city of New York, the pre-existing terminology is still in common use. Thus, persons in Brooklyn will speak of going to New York when in fact they mean Manhattan, and to Long Island City, which is now no longer in existence.

If by the employment of duress or pressure amounting to undue influence he shall overcome the will of the testator, so that while thus under his control the testator bequeaths money to some third person named by him, the bequest is invalid. A clear case of undue influence is made out where the testator, being under the complete control of his spiritual adviser, and having no volition of his own, bequeathed money to a religious body to which the latter belongs. But it is not to be understood that a charitable gift must be from a testator who is wholly uninfluenced in every way. Indubitably fair means may be employed to procure a charitable bequest. One may approach the testator and seek to direct the current of his bounty in favor of a particular corporation by appeals to his sympathy, or pride, or his religious belief. Solicitations, suggestions, argument, and perhaps remonstrance, may be used. Advice, persuasion and entreaty do not, in connection with a charitable gift, constitute undue influence, if no fraud or deceit is practiced and no force, imposition or duress is employed.¹

Where a will which makes a provision for a church is drawn by and executed under the supervision of a rector, priest, pastor or other officer of that church, the same rules and principles are applicable. This is particularly true where the person drawing the will is named as an executor to carry out the purposes of the testator. If the testator was aged, infirm or of weak mind; if, prior to the execution of the will, he had manifested little, if any, interest in the church or institution which was the beneficiary; if those who were then living and the natural objects of his bounty were designedly kept in ignorance of his illness and of his testamentary disposition,—the conviction is almost irresistible that the will was not spontaneous, but was procured by undue influence.²

¹ *President, etc. of Bowdoin College v. Merritt*, 75 Fed. R. 499.

² *Drake's Appeal*, 45 Conn. 9, 19, 1 Am. Prob. R. 227, 237; *Tomkins v. Tomkins*, 1 Bail. 96; *Langton's Will*, 1 Tucker, Sur. R. 301. A will by a member of a religious order giving her property to the order, made in fulfillment of a vow by the testatrix,

required by the rules of the order, is not by that fact alone presumed to have been procured by coercion or undue influence, where it does not affirmatively appear that the testatrix ever regretted having taken the vow. *In re Will's Estate* (Minn., 1897), 69 N. W. R. 1090. See also *ante*, § 146.

§ 837. **The English statutes of superstitious uses.**— When Henry VIII., after his quarrel with the Church of Rome, had assumed the headship of the English Church, and, as a part of his scheme of aggrandizement, had appropriated the property of the monastic houses throughout the kingdom, parliament, urged by the importunity of the king, enacted a statute under which uses and trusts thereafter declared in lands and hereditaments except for the term of twenty years, for the purposes of procuring masses, or for the support of the Catholic worship, or for like purposes, were declared to be absolutely void. Subsequently in the first year of the reign of his son, Edward VI., another and similar statute was passed which declared that every gift, either of land or personal property, in trust or otherwise, for the perpetual support of a priest, or for furnishing or lighting any lamp or other light in a chapel, or for the support of masses for the dead, or for the saying of prayers to release souls from purgatory, or for *any like purpose*, should be void, and the property thus given was, under the express terms of the statute, forfeited to the king. Out of these statutes a doctrine grew up that devises to superstitious uses were invalid in England which is of some historical interest, though it was never transplanted to America, or incorporated into our system of law.

The statutes mentioned, being in restraint of the rules of the common law, received a strict construction in the English courts. Thus, devises and gifts in trust for the support of ministers and places of worship of Protestant dissenters, and for the propagation of the religious tenets of such persons, were sustained by the court of chancery in very early times, despite the fact that the teaching of such doctrines was altogether at variance with and contrary to the dogmas of the established church.¹

¹ *Attorney-General v. Baxter*, 1 Eq. Cas. Ab. 96, pl. 9, 1 Vern. 248, 2 id. 105. In this case, though the Lord Keeper at first held a bequest which was to be distributed among certain ministers who had been ejected from their pulpits under one of the acts punishing non-conformity to be invalid, his decision was subsequently reversed in the appellate court. The

text is also sustained by the cases of *Attorney-General v. Pearson*, 8 Merivale, 353, where the whole subject of superstitious uses is examined in great detail and discussed with much ability by Lord Eldon. *Attorney-General v. Hickman*, 2 Eq. Cas. Ab. 193. In the case of *Doe v. Hawthorn*, 2 B. & Al. 96, a devise to a chapel under the patronage of the trustees

§ 838. **The validity of bequests for the support of the Roman Catholic religion in England.**—As a result of the operation of the two statutes,¹ all gifts, either of real or personal property, for the support or propagation of the Roman Catholic belief were, during a period of over two centuries, absolutely void in England. At length, however, in consequence of the increase of material wealth, and the spread of the principles of religious and civil liberty at the beginning of the present century, such a condition of things became intolerable. To remedy a condition of affairs which worked so much injustice to a large and law-abiding class of persons, it was enacted by the English parliament in the year 1833 that “his majesty’s subjects, professing the Roman Catholic religion in respect to their schools, places for religious worship, education and charitable purposes in Great Britain, and the property held therewith, and the persons employed in and about the same, shall, in respect thereof, be subject to the same laws as the Protestant dissenters are subject to in England in respect to their schools and places for religious worship, education and charitable purposes, and not further or otherwise.” Since the enactment of this statute, testamentary gifts for the advancement of the Roman Catholic religion, and for educational and charitable purposes under the control and supervision of the authorities of that church, have been and are perfectly valid so long as they are not otherwise contrary to the law of the land.²

§ 839. **The American view of the doctrine of superstitious uses.**—The English statutes of mortmain are not in operation in any part of our country, partly for the reason that they never formed a part of the system of law which was in force in the colonies prior to the Revolution, and partly because these statutes are absolutely irreconcilable with and repugnant to our principles of government. In most of the states there are very powerful and effective limitations placed upon the acquisition

of the countess of Huntington was sustained. And at a later period a trust for the purpose of propagating the writings of Joanna Southcot, who believed and preached that she was with child by the Holy Ghost, and other delusions of a similar character, was upheld. *Thornton v. Howe*, 31

Beav. 14. See also *Attorney-General v. Cook*, 2 Ves. 273.

¹ 23 Hen. VIII, ch. 10, and 1 Edw. VI, ch. 14.

² *Bradshaw v. Tasker*, 2 My. & K. 221; *In re Michel’s Trusts*, 28 Beav. 32.

of lands by corporations, and these statutes, so far as they require the possession of a statutory license by the corporation, undoubtedly resemble the statutes of mortmain. The statute of 9 George II., chapter 36, which prohibits disposition of lands to charitable uses, unless by deed made and enrolled at least six months before the death of the donor, was purely local, and did not extend to Ireland or the colonies.¹ But similar statutes have been enacted in very many of the states.

In view of the absence of any state church and of the absolute freedom of religious belief and worship which is guaranteed by the federal and all the state constitutions, the theory of the invalidity of charitable gifts, because of their devotion to superstitious uses, has no place in our law. As has been explained in a prior section, the early statutes under which so many gifts for religious purposes were overthrown, because superstitious, have been repealed or materially modified in England.² They never had any operation in the colonies as such, and are, it needs hardly be said, absolutely repugnant to our system of government.³ It is hard to see how the courts could hold otherwise. In America all forms of religion not involving the teaching of immorality are tolerated, and, as no one of them is established, each and all have the same right to the protection of the law. It follows, therefore, that all, so far as they do or do not contravene any law of the land, are equally to be forbidden or equally to be advanced and defended. Christianity is, in a sense, a part of the law of the land, in so far, at least, as the wise and benignant principles of its morality have received the sanction and confirmation of our courts. But if religious liberty is to be more than a vague generality, it is clear that a rule of law by which such an affirmance is given to the religion of Christ must not be construed to prevent the devotees of any other religious belief from worshiping their

¹ *Odell v. Odell*, 10 Allen (Mass.), 6; *Tudor on Charitable Trusts*, 94; *Story on Equity*, sec. 1194. A somewhat similar act in Massachusetts was repealed immediately after the Revolution. *Bartlett v. King*, 12 Mass. 545.

² See § 838.

³ The question has not been often

raised in the cases, but where an objection has been made upon this ground, it has always been repudiated with much firmness and unanswerable logic by the courts. *Gass v. Wilhite*, 2 Dana (Ky.), 170; *Attorney-General v. Jolly*, 1 Rich. (N. C.) Eq. 99; *Frierson v. General Assembly*, 7 Heisk. (Tenn.) 683.

Creator according to the dictates of their conscience, or to forbid them from devoting their property by testamentary disposition to carrying on the form of worship in which they believe, and propagating the doctrines of their faith. Hence, the law cannot forbid the Roman Catholic from devising his estate for the purpose of founding a nunnery or a monastery, or for the procurement of masses; or the Hebrew from giving his property over to the propagating of his faith; or even the Mohammedan, or the Buddhist, from devoting his wealth, the one to assist or relieve those who may undertake the annual pilgrimage to Mecca, the other to build a temple for his graven idols.

§ 840. **The English statutes of mortmain.**—At the common law, that is to say, in the absence of any disabling statute, a corporation, whether ecclesiastical or lay, had the same capacity as a natural person to acquire a valid title to lands by purchase and to hold and dispose of the same for its corporate purposes.¹ This natural and unlimited right possessed by all corporations continued to be recognized until, for reasons presently to be explained, it was curbed and restricted, and in many cases wholly abolished by statutes. After the conquest of England by the Normans, and when these semi-barbarous and domineering warriors had firmly established their government and had engrafted the principles of the feudal system upon the framework of the English nation, the power of the Christian church greatly increased. The clerics enjoyed, and often abused, a monopoly of that small amount of learning which had survived the incursions of the northern barbarians and the ravages of a continual and internecine warfare. Whatever of conscience still remained in the hearts of the members of the conquering race prompted them to seek at the hands of the priest or bishop, when weakened by illness or when the terrors of death came upon them, absolution for their deeds of murder and rapine. The houses of the monastic orders which about this time began to spring up throughout England were not only places of retreat for those who by their condition or inclination were unfitted for the rude and warlike life of the times, but were also the sources of continual almsgiving to the

¹Co. Lit. 44a, 300b; 10 Co. 30b; 2 Rations, 76, 78, 108, 115; Comyn's Digest, Franchise, 11, 15, 16, 17, 18.

poor and wretched. This latter class was, as may well be imagined, in view of the constant private warfare that was being waged, and the resulting insecurity of life and property, both numerous and widely dispersed. Poverty, wretchedness and disease were rife on every hand. The wounded and ragged soldier returning from the wars, the lazy professional mendicant, too indolent to labor and too cowardly to rob, the escaping serf pursued by his master, the franklin dispossessed from his freehold, the wandering apprentice seeking a new and perhaps a better master, constituted a mass of miserable and wretched humanity roaming through the country. Such were indeed vagrants wandering about from place to place and without visible means of support. To a certain extent the necessities of these poor people were relieved by the doles given out by the steward of the lord of the manor. But failing this somewhat uncertain source of sustenance, they were reasonably sure that, could they but reach the door of the monastery or the abbey, their physical wants would be relieved by the benevolence of the monks. In order that the tide of almsgiving might be sustained, it became necessary for the ecclesiastical orders to acquire and cultivate large tracts of land to furnish the food and shelter which were thus dispersed in indiscriminate almsgiving. The monastic orders, by reason of the spiritual control which they asserted over the minds of the feudal landlords, speedily acquired large holdings, which natural inclination and the necessity of their situation prompted them continually to increase. Such lands thus procured were taken out of the market permanently, and, as Chancellor Kent puts it, absorbed by the ecclesiastics in perpetuity, "in hands that never die." Not only was this true, but they were by this transfer absolutely freed from all public and feudal charges. The tract of arable land which, when its landlord was a knight or baron, supplied a half dozen stout archers or men at arms to the king, supplied no military help whatever when its owner was a bishop, an abbot or other religious corporation. The evil at length became so intolerable, not only to the king, but to the baronage, who saw their powers threatened by this gradual but irresistible absorption of the landed wealth of the realm, that as early as the time of Henry III. statutes were passed designed to check this absorption of the land. These statutes are com-

monly termed the statutes of mortmain. The operation of the earlier statutes was confined to forbidding the acquirement of the legal title to lands by the religious orders. But these astute men having by means of uses and trusts, by which the legal title purchased by them was held by lay persons for their benefit, evaded those statutes, it was provided by subsequent statutes that lands conveyed to a third person for the use of any corporation should be liable to forfeiture in like manner as though conveyed directly to the corporation. And the same statute prohibited lay as well as religious corporations from acquiring lands. The statutes of mortmain, properly so called, which have been above described, and the statutes against superstitious uses, which are somewhat analogous, have not been adopted in the United States of America. Their origin, *raison d'être*, and their application are wholly English. They have never been, either expressly or by implication, extended to any English colony. They were local in their character, and intended wholly for the carrying out of principles exclusively applicable to local necessities and institutions.¹

§ 841. Statutory limitations upon the value of property which can be owned by charitable corporations.—Though the policy which was at the basis of the English statutes of mortmain is by no means in harmony with the principles of law in the United States of America, no one doubts that it is within the power of a state legislature to limit the amount of property, either real or personal, which a charitable corporation may own and employ for the purposes of its creation. This is usually done by a clause in the charter or other general statute under which the corporation is incorporated, by which the corporation is authorized to take title to real and personal property up to a certain value expressly mentioned. Where the amount of the property which a charitable corpo-

¹ 2 Kent, Comm., p. 228; *Vidal v. Girard*, 2 How. (U. S.) 189; *McCartee v. Asylum*, 9 Cow. (N. Y.) 437, 451; *Wright v. Trustees*, 1 Hoffman's Ch. (N. Y.) 202; *Potter v. Thornton*, 7 R. L. 252; *Beall v. Fox*, 4 Ga. 404; 2 Redfield on Wills, 510; Story, Equity Jurisprudence, § 1194. "The English statutes of mortmain were never in

England supposed to have been meant to extend to her colonies and were never in force in those of them in America which became independent states but by legal enactment." *Perin v. Carey*, 24 How. (U. S.) 465, 506; *Odell v. Odell*, 10 Allen (Mass.), 1, 7; Dane's Abr. 5, 238, 239.

ration may own is thus expressly limited by statute, every devise or bequest is void so far as it attempts to convey to it the title to property which in value exceeds the limitation mentioned in the statute. The title to the property in excess of the statutory limit does not vest in the corporation, for the statute has deprived the corporate beneficiary of all capacity to take by will so far as the devise exceeds the limitation imposed by statute. The property thus invalidly disposed of passes to the residuary devisee, in case there is a residuary clause, or, if there be none, then to the heirs or the next of kin of the testator, as intestate property.

The main difficulty has been to determine by whom the limitations imposed by the statute are to be taken advantage of. It is well settled that the validity of a testamentary provision which is alleged to be invalid because of the legal incapacity of a charitable corporation to take cannot be determined in any collateral proceedings. But upon the question whether a direct proceeding to confirm the title to the property in the heirs of the testator can be initiated by them, or whether it can only be commenced by the attorney-general acting for the commonwealth, the cases are at variance. In New York and in some other states the courts have held that, inasmuch as the title to the property vests at once in the heirs or the next of kin, they may raise the question of the validity of the bequest upon the ground that the charitable corporation has not the capacity to take because the statutory limit has been exceeded.¹ But in other states, where limitations have been by statute imposed upon the value of the property which a charitable corporation shall be permitted to hold, it has been held that the limitation cannot be taken advantage of by the heirs or next of kin of the testator in initiating a legal proceeding. The statutory provisions are wholly regulative and directory in their nature, being passed by virtue of the inherent power possessed by the legislature to regulate and control corporations, and can therefore only be enforced by a direct proceeding upon the part of the state conducted by the attorney-general.²

¹ In re McGraw's Estate, 111 N. Y. 66, 19 N. E. R. 233; Wood v. Hammond, 16 R. L. 98, 17 Atl. R. 324; Barkley v. Donnelly (Mo.), 19 S. W. R. 233.

² Farington v. Putnam (Me., 1896), 37 Atl. R. 652; Congregational Church v. Everett (Md., 1897), 36 Atl. R. 654; De Camp v. Dobbins, 29 N. J. Eq. 42; Wade v. American Col. Soc., 15 Miss.

§ 842. **Statutory limitations upon the times of charitable gifts by will.**—In many states statutes have been enacted which substantially provide that no real or personal estate shall be disposed of by will to charitable institutions, and in some instances to private persons upon charitable trusts, except the will shall have been executed at least thirty days, or some other particularly mentioned period, *before* the decease of the testator.¹ These statutes are intended to restrain the power of the testator *to give*, and not the capacity of the corporation *to take*. Hence they are applicable to devises by all testators who are resident within the jurisdiction of the state where the statute has been passed, not only to charitable corporations which are domiciled there, but also to gifts to foreign charities. They ought to receive a reasonable construction. Of the power of the legislature to place these and similar restrictions upon the testamentary power there can be no question. And the same may with truth be affirmed of those enactments which limit the proportion of his property which a testator, leaving a wife or chil-

(1846), 663; *Heiskell v. Chickasaw Lodge*, 3 Pickle (Tenn.), 668, 11 S. W. R. 668. Compare *United States v. Church of Jesus Christ*, 15 Pac. R. 475, 5 Utah, 861, in which a receiver was appointed upon the application of the attorney-general of the United States for the Mormon church where it appeared that such church held property largely in excess of the value of \$50,000 which had been fixed by the act of congress of July 1, 1862, section 3, as the amount which a religious society could hold in any territory of the United States. See also *Gilmer v. Stone*, 120 U. S. 586, 7 Sup. Ct. 699. Where a will provides that the estate of the testator shall be converted into personal property and bequeaths the property thus converted to a college, no real estate is devised to the college and the gift is not within the terms of a statute limiting the amount of real property which may be owned by the college. *In re McGraw*, 111 N. Y. 66, 19 N. E. R. 233. A charitable in-

stitution whose charter limits the amount of property which it can hold may take only as much of that given to it as will, with the amount it owns at the death of the testator, make up the maximum amount it could *then* hold. An amendment to the charter procured subsequently to the death of the testator will not enable it to take the residue of the property given by the will. *Coggeshall v. Home for the Friendless*, 18 R. I. 696, 31 Atl. R. 694.

¹ *Lefevre v. Lefevre*, 59 N. Y. 434; *Fairchild v. Edson*, 77 Hun, 298; *Chamberlain v. Taylor*, 105 N. Y. 185, 630; *Carter v. Board of Education*, 23 N. Y. Supp. 95, 68 Hun, 434; *Kerr v. Dougherty*, 79 N. Y. 327; *Hollis v. Seminary*, 95 N. Y. 166; *In re Hildburn*, 16 Pa. Co. Ct. R. 39; *Craig v. Lilly* (Pa., 1887), 9 Atl. R. 171; *Price v. Maxwell*, 28 Pa. St. 23. See also *Wisconsin Rev. St.*, sec. 2039; *Georgia Code*, sec. 2419; *New York Rev. St.*, 58, sec. 4; *Michigan Com. Laws*, sec. 2009.

dren, may dispose of to charitable institutions.¹ This legislation is designed to secure to the wife, children and dependent parents of the testator, a sufficient provision for their maintenance out of the estate of that person who is in his life-time legally responsible for their maintenance. Though the statute invalidating bequests to corporations by wills executed within a period specified may not refer expressly to religious corporations, they are generally understood to be comprised within their provisions.² A statute which places a limitation upon devises to corporations which are incorporated according to its provisions has of course no application to foreign charities,³ nor to those incorporated under *other statutes* of the same state.⁴

§ 843. **The law of testamentary charitable gifts in New York.**—In the state of New York the law regulating charities is wholly the creation of statutory enactments. By special charters and under general statutes numerous institutions have been created for all the charitable uses enumerated in the statute of Elizabeth, and for many others not enumerated. By virtue of these statutes such corporations have capacity to take real property for the charitable purposes to carry out which they exist under the incorporating act. The courts of New York hold that a devise of land to a religious or charitable institution to aid it in carrying out the purposes of its creation, either by spending the principal or only the interest, *does not*

¹ *American Bible Society v. Healey* (Mass.), 26 N. E. R. 404; *Healy v. Reed*, 153 Mass. 97, 199; *Thompson v. Swoope*, 24 Pa. St. 474.

² *In re Hewitt's Estate*, 94 Cal. 376, 29 Pac. R. 775; *Milwaukee v. Protestant Home*, 87 Wis. 409, 413; *In re Knight's Estate*, 28 Atl. R. 303, 159 Pa. St. 500.

³ *Doty v. Hendrix*, 53 Hun, 48, 5 N. Y. S. 284.

⁴ *Kavanagh's Will*, 26 N. E. R. 470, 125 N. Y. 418; *Cole v. Frost*, 51 Hun, 578, 4 N. Y. Supp. 308. In California the statute is as follows: "No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society, or to any person or persons in trust for charitable uses, ex-

cept the same be done, by will duly executed, at least thirty days before the decease of the testator, and if so made at least thirty days prior to such decease, such devise or legacy, or each of them, shall be valid, provided that no such devises or bequests shall collectively exceed one-third of the estate of the testator leaving legal heirs, and in such case a *pro rata* deduction from such devises and bequests shall be made so as to reduce the aggregate thereof to one-third of such estate, and dispositions contrary thereto shall be void and go to the residuary legatee, next of kin or heirs according to law." California Code, sec. 6313.

create any trust whatever. The ownership of the land is absolute so far as the amount within the possession of the corporation does not exceed the limitations of its act of incorporation. The fact that the testator designates the purpose for which the property given to the corporation is to be used does not create any trust; and if several purposes are within the scope of the corporative power, it would seem that, according to a *dictum* in a late case, the corporation may employ the property given for any one of them, though that purpose may differ widely from that named by the testator.¹ In the state of New York, though the statutes of mortmain have been expressly repealed, a devise to a corporation *of land* for charitable purposes, though directly to the corporation, and stated to have been given to it for charitable purposes which are within the scope of their powers, is absolutely void, and the land goes to the heir of the testator not charged with any trust in favor of the charity, in every case where the *corporation is not expressly authorized either by its charter or by some other statute to take lands by devise.*² For inasmuch as devises to corporations, which were void under the mortmain acts, were validated in England only by virtue of the statute of Elizabeth, which had been expressly repealed in New York, all devises direct to corporations, and also all devises in trust for charitable corporations, are absolutely void unless the corporation in question had by statute the right to take by devise. But these rules have no application to bequests.³

¹ Bird v. Merkle, 144 N. Y. 544, 551, citing Williams v. Williams, 8 N. Y. 525; Holland v. Alcock, 108 N. Y. 312; Wetmore v. Parker, 52 N. Y. 458; Le Couteulx v. City of Buffalo, 33 N. Y. 333.

² McCartee v. Orphan Asylum, 9 Cowen (N. Y.), 437, 469, 483. See also Ayres v. M. E. Church, 8 Sandf. (N. Y.) 351, 363.

³ In this case the court, in the course of a most thorough discussion of the law of charitable trusts, says on page 469: "The benevolence of Christian and other philanthropists will not be unduly restrained. . . . Charitable and public uses are not

abolished by subjecting them to the provisions of the revised statutes.

. . . Practically the principal effect will be found to be, that lands cannot be granted or devised so as to render them forever inalienable without the assent of the legislature, unless they are granted or devised to a corporation that by law is authorized to take and bound to retain them. The necessity of an appeal to the legislature . . . we cannot regard as unmixed evil. When a new and plainly meritorious charity is meant to be founded . . . none of us can fear that the sanction of the legislature will be withheld, nor

common-law rule that "dying without issue," or any phrase of identical meaning, signifies an indefinite or general failure of issue in the absence of a controlling context, and that a limitation over thereupon, after an estate in fee simple, is void for remoteness, is recognized in the United States unless abolished by statutes establishing a different rule of construction.¹

In view of this rule it becomes necessary to inquire what is meant in law by the phrase "*an indefinite failure of issue.*" An indefinite failure of issue, or a general failure of issue, is a failure of issue whenever it shall happen. Chancellor Kent defines it as a failure sooner or later, without any fixed, certain or definite period within which, or at the end of which, it *must happen*. If the failure of issue is an indefinite failure of the issue of the owner of the fee, it cannot happen until *all his issue or posterity*, who are either living at his death, or *who are born at any time thereafter, have died*. It will not happen until all his posterity has become extinct. The law cannot determine in advance the period within which this blotting out of the issue of the first taker shall take place, in order that the gift over on the happening of such a contingency may vest. Where the first taker of the fee dies leaving issue surviving at

¹Moody v. Walker, 37 Ark. 198; Watkins v. Quarles, 23 Ark. 179; Roberts v. West, 15 Ga. 122, 143; Lillibridge v. Ross, 31 Ga. 730; Voris v. Sloan, 68 Ill. 588; Fisk v. Keene, 35 Me. 349, 355; Torrance v. Torrance, 4 Md. 11; Wallis v. Woodland, 32 Md. 104; Dallam v. Dallam, 7 Har. & J. (Md.) 220; Nightingale v. Burrell, 15 Pick. (Mass.) 104; Quigley v. Gridley, 132 Mass. 37; Gray v. Bridgefort, 33 Miss. 344; Chism v. Wallace, 29 Mo. 288; Wardell v. Allaire, 20 N. J. Law, 9; Patterson v. Madden (N. J., 1897), 33 Atl. R. 41; Dacies v. Steele, 38 N. J. Eq. 170, 173; Moffat v. Strong, 10 Johns. 15; Jackson v. Billinger, 18 Johns. (N. Y.) 368; Wilson v. Wilson, 32 Barb. (N. Y.) 332; Mascyk v. Vanderhorst, 1 Bailey Eq. (N. C.) 48; Brantley v. Whittaker, 5 Ired. (N. C.) L. 225; Rice v. Satterwhite, 1 Dev. & Bat. (N. C.) 60; Vaughan v. Dickes, 20 Pa. St. 509; Wynn v. Storey, 38 Pa. St. 160; Mangel's Appeal, 61 Pa. St. 248; Kleppner v. Lavery, 70 Pa. St. 70; Snyder's Appeal, 95 Pa. St. 177, 181; Hackney v. Tracy, 137 Pa. St. 53, 26 W. N. C. 464, 20 Atl. R. 560; Hoff's Estate, 147 Pa. St. 636; Moorhead's Estate, 180 Pa. St. 119, 36 Atl. R. 647; In re Pepper, 166 Pa. St. 304, 31 Atl. R. 100; Burroughs v. Foster, 6 R. L. 534; Arnold v. Brown, 7 R. L. 188; Bailey v. Hawkins, 18 R. L. 573; Magrum v. Piester, 16 S. C. 323, 324; Cruger v. Hayward, 2 Des. (S. C.) 94; Armstrong v. Douglass, 89 Tenn. 219, 14 S. W. R. 604; Randolph v. Wendel, 4 Sneed (Tenn.), 647; Bowman v. Tucker, 3 Humph. (Tenn.) 650; Brattleboro v. Mead, 43 Vt. 556; Sydnor v. Sydnor, 2 Munf. (Va.) 269; Bells v. Gillespie, 5 Rand. (Va.) 273; Williamson v. Daniel, 12 Wheat. (U. S.) 569.

his death, the 'extinction of such posterity may take place within a few months or a few years after his death; or it may be postponed for generations thereafter. For this reason the executory devise after the fee, to arise on an indefinite failure of the issue of the devisee of the fee, is absolutely void. To hold otherwise would result in an indefinite suspension of the power of alienating the fee in the lands thus disposed of. On this account, if an estate is devised to A. in fee simple, with a limitation of the fee to another after an indefinite failure of the issue of A., the limitation over is an executory devise of a fee which is void for remoteness of vesting, and will be discarded, and A. will take an estate in tail by implication¹ arising from the provision for a failure of issue. This rule of the common law no doubt resulted, in the majority of cases, in overthrowing the intention of the testator. The intention of the testator in limiting an estate over after a fee was that the first devisee should, on having issue, be enabled to dispose of it — that is, that he should have a *fee conditional*; and, if he did not dispose of it, that on his death, leaving such issue, they should take it. But Chancellor Kent says: "It is very probable that in most cases the testator may have had no precise idea of the meaning of the words other than that the estate is to go over in case the first taker shall leave no posterity to enjoy it." But it is absurd to assume that he means that if the primary tenant in fee shall leave a child, who should die in a month or a year afterwards, the remainder should go into effect. The general intention of the testator is to give a fee simple, or a fee tail which shall descend to the children and other issue of the first devisee, to be under their absolute control, with full power of alienation; that he really intends to suspend the power of alienation *until the issue shall become extinct* is an absurd supposition.²

¹ § 471.

² Death or dying without issue or bodily heirs will, in the absence of any expression of intention to the contrary, be conclusively presumed to refer to a natural and physical death without issue or heirs. Accordingly, in the case of a devise to a person, and upon his death without issue or chil-

dren then over, the imprisonment in the state's prison of such person for the term of his natural life will not vest either the title or right of possession to the executory devise prior to his natural death. This is the rule in New York, where it is provided by statute that a prisoner who has been sentenced to a life imprison-

§ 845. A conditional or determinable fee is created where the failure of issue is a definite failure — Conditional fees distinguished from estates in fee tail.— Where the failure of issue attached to a devise in fee is to be taken as signifying a definite failure of issue, *i. e.*, *the death of the first taker without leaving issue surviving*, the estate created in the first taker is a base or determinable fee, and the devise over is an executory devise which is to vest upon the happening of the prescribed contingency. On the other hand, if the failure of issue referred to is to be construed as an indefinite failure of issue, the estate in the first taker is an estate tail,¹ which may in the United States be converted into a fee simple by statute, and is then alienable, the devise over being void. In view of these well settled rules of construction it may be well in this place to consider briefly some of the elementary principles of the law of real property appertaining to the creation and nature of base or determinable fees and of fees simple conditional with which they are often confounded. A base, qualified or determinable fee is defined by Chancellor Kent to be “an interest which may continue forever, but which is liable to be determined by some event or act or circumstance circumscribing its continuance or extent.”² A devise of the fee to A., and if he shall die without issue surviving then over, confers upon the first taker a qualified fee, which may be defeated by his death without leaving issue him surviving. In that event the executory devise vests. If, however, he shall die leaving issue living at his death, the fee vests in such issue, who take, not as purchasers under the will, but by descent from their ancestor, and the executory devise expectant upon the definite failure of issue is defeated. The owner of the base or qualified fee cannot convey in fee simple, for his estate is defeasible upon the contingency, *i. e.*, a definite failure of issue, which cannot

ment shall be deemed civilly dead. *Avery v. Everett*, 110 N. Y. 317, 18 N. E. R. 148, Earl dissenting.

¹ *Ante*, § 471.

² 4 Kent, Com., p. 9. “A base or qualified fee is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at

an end.” . . . “The estate is a fee, because by possibility it may endure forever in a man and his heirs; yet as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee.” 2 Black. Com., p. 109.

happen until his death. Until that event happens it cannot be determined in whom the fee will ultimately vest.

A base fee differs from a fee conditional at the common law, which latter was a *fee limited to some particular description of heirs* to the exclusion of others. Thus a fee to A. and the heirs of his body was a fee conditional upon A. having heirs of his body. As soon as A. had issue born to him, the condition was performed, the fee became absolute in A., and he might, prior to the statute *De Donis*, at once alien the land absolutely or charge or incumber it in any way. The first taker would usually alien the land and take it back by a conveyance to himself and his heirs general. If he did not do this, the course of descent was not changed by the birth of issue. The fee conditional could not descend to any class of heirs but the heirs of the body; and if he had issue who did not survive him, the fee reverted to the donor or grantor.¹ Because of the almost universal custom of immediately conveying the fee upon the birth of issue, and taking it back by a conveyance in fee simple, by which the possibility of a reversion was forever defeated, the Statute of Westminster 2d, 13 Edw. I., c. 1, was enacted. The effect of this act was to preserve the estate to the issue of the first taker, and on the other hand to convert a mere possibility of a reversion into an actual reversion in the original grantor. The courts, in construing this statute, would not permit the alienation of the fee upon birth of issue, but divided the estate into two parts; one of which was a sort of particular estate for life, which was called a fee tail, with a *quasi* contingent remainder in the heirs of the body, and a reversion expectant upon an indefinite failure of issue, in the grantor and his heirs. These elementary principles, while in most cases of little application in the United States, are of value in those jurisdictions where it is held that a devise in fee to A. with a devise over on a failure of issue gives A. a fee conditional as at the common law.²

¹ 2 Black. Com., p. 111.

² See cases in next section. "A fee simple is the largest estate a man can have in lands, being an absolute estate in perpetuity. The essential matter is that such an estate is so brought into existence that it *may* continue

forever. Where the estate in fee is granted subject to some condition in the instrument creating it, or to some condition implied by law to be there after performed, it is called a 'conditional fee.' A 'determinable fee' embraces all fees which are determined

§ 846. **The estate of the primary devisee where the failure of issue is a definite failure.**—A limitation of a fee after a failure of the issue of a devisee to whom a fee is also given, either in fee simple or in fee tail, is valid *if the failure of issue is a definite failure of issue; i. e.,* issue living at the death of the first devisee. If from the language of the will itself it is evident that the testator *meant a definite failure of issue* (and the same of course should apply where *by statute* “die without issue” or “death without issue” is to be construed to mean a failure of issue at the death of the person taking), and the primary devisee has a fee, whether by words of limitation and inheritance or otherwise, the first taker will have a base or determinable fee, which is defeasible upon his death without *leaving* issue. He has a determinable fee (or perhaps more properly a conditional fee), which enlarges into a fee simple in his issue if he shall die leaving issue. It is a fee *conditioned upon his having and leaving issue at his death*, and the limitation over is valid, not as a contingent remainder limited after an indefinite failure of issue, but as an executory devise of a fee in defeasance of an estate in fee determinable.¹ The primary devisee

by some act or event expressed, in their limitation, to circumscribe their continuance, or inferred by law as bounding their extent. In its broader sense a determinable fee embraces what is known as a conditional fee. When it becomes an established fact that the event which may determine the estate will never occur, a determinable fee enlarges into a fee simple absolute. So, when the condition upon which a conditional fee rests has been performed, the estate becomes an absolute fee.’” *Fletcher v. Fletcher*, 88 Ind. 420.

¹*Flinn v. Davis*, 15 Ala. 132, 136; *Mason v. Pate*, 34 Ala. 379; *Goldsby v. Goldsby*, 38 Ala. 404; *Newsom v. Holesapple*, 101 Ala. 682, 15 S. R. 644; *Clark v. Stanfield*, 38 Ark. 347; *Myar v. Snow*, 49 Ark. 125, 4 S. R. 381; *Hudson v. Wadsworth*, 8 Conn. 348, 362; *Williams v. McCall*, 12 Conn. 328; *Smith v. Pendell*, 19 Conn. 107; *St. John v. Dann*, 34 Atl. R. 110, 113,

66 Conn. 401; *Friedman v. Steiner*, 107 Ill. 125; *Summers v. Smith*, 127 Ill. 645, 21 N. E. R. 191; *Waters v. Bishop*, 122 Ind. 516, 519; *Smith v. Hunter*, 23 Ind. 580; *Pool v. Benning*, 9 B. Mon. (Ky.) 623; *Thackston v. Watson*, 84 Ky. 206; *Martin v. Remaker* (Ky., 1888), 9 S. W. R. 419; *Marble v. Phillips* (Ky., 1893), 20 S. W. R. 306; *Webster v. Webster* (Ky., 1893), 22 S. W. R. 920; *Collins v. Thompson* (Ky., 1897), 43 S. W. R. 227; *Wheatland v. Dodge*, 10 Metc. (Mass.) 502; *Hawley v. Northampton*, 8 Mass. 3; *Webster v. Ellsworth*, 147 Mass. 602, 18 N. E. R. 569; *Bowker v. Bowker*, 19 N. E. R. 213, 148 Mass. 198; *Welch v. Brimmer*, 47 N. E. R. 699, 169 Mass. 204; *Backus v. Presbyterian Assembly*, 77 Md. 50; *Lednum v. Cecil*, 76 Md. 153, 24 Atl. R. 452; *Mason v. Johnson*, 47 Md. 355; *Devecmon v. Shaw*, 70 Md. 224, 16 Atl. R. 645; *Hutchins v. Pearce*, 80 Md. 434, 31 Atl. R. 501, 502; *Weybright v.*

cannot convey the fee so as to bar the interests of his issue living at the date of the conveyance and at his death, nor can he by a conveyance destroy the executory devise which will take effect in succession upon his death without issue. Hence there is a suspension of the power of alienation for his life. Nor will the general rule which holds that an unlimited power of disposal in the first taker enables him to defeat the devise over apply in the case of such an executory devise, for it is apparent that the existence of a devise over is in no wise dependent on the exercise of the power, but rather on the death of the devisee without any surviving issue. All, therefore, that the first devisee could convey during his life is his defeasible or conditional fee, and his grantee takes that subject to defeasance by the executory devise, on the death of the first taker without issue him surviving.¹

Powell, 39 Atl. R. 421, 86 Md. 573; Goodell v. Hibbard, 32 Mich. 47, 55; Mulreed v. Clark (Mich., 1896), 68 N. W. R. 138; Hall v. Chaffee, 14 N. H. 215; O'Brien v. O'Leary, 64 N. H. 332, 10 Atl. R. 697; Den v. Snitcher, 14 N. J. L. 53; Den v. Allaire, 20 N. J. L. 6; Seddell v. Wills, 20 N. J. L. 223; Kennedy v. Kennedy, 29 N. J. L. 85; Groves v. Cox, 40 N. J. L. 44; Neilson v. Bishop, 17 Atl. R. 962, 45 N. J. Eq. 473; Wilson v. Wilson, 46 N. J. Eq. 321, 19 Atl. R. 132; Bonnell's Ex'rs v. Bonnell, 47 N. J. Eq. 540, 20 Atl. R. 895; Wilkes v. Lion, 2 Cow. (N. Y.) 333; Jackson v. Billinger, 18 Johns. (N. Y.) 368; Roosevelt v. Thurman, 1 Johns. Ch. (N. Y.) 220; Norris v. Beyea, 13 N. Y. 273, 285; Trustees v. Kellogg, 16 N. Y. 83, 87; Tyson v. Blake, 22 N. Y. 558, 563; Van Horne v. Campbell, 100 N. Y. 287, 3 N. E. R. 316, 771; In re New York, L. & W. R. R. Co., 105 N. Y. 89, 11 N. E. R. 492; Beck v. Ennis, 7 N. Y. S. 264, 54 Hun, 126; Ramsay v. De Remer, 20 N. Y. S. 143, 65 Hun, 212; Sadler v. Wilson, 5 Ired. (N. C.) Eq. 296; Davis v. Parker, 69 N. C. 271; Smith v. Brisson, 90 N. C. 284; Trexler v. Holler, 107 N. C. 617, 12 S. E. R. 288; Buchanan v. Bu-

chanan, 99 N. C. 308, 15 S. E. R. 430; Kelly v. Williams, 18 S. E. R. 693, 113 N. C. 437; Langley v. Heald, 7 W. & S. (Pa.) 96; Hausell v. Hubbell, 24 Pa. St. 244; Covert v. Robinson, 46 Pa. St. 274; Riehle's Appeal, 54 Pa. St. 97; Greenawalt v. Greenawalt, 71 Pa. St. 483; Reinoehl v. Shirk, 119 Pa. St. 108, 12 Atl. R. 806; In re Miller's Estate, 22 Atl. R. 1044, 145 Pa. St. 561, 29 W. N. C. 69; In re Gormley, 154 Pa. St. 878, 25 Atl. R. 814; Burrough v. Foster, 6 R. I. 534; In re Swinburne, 16 R. I. 208, 14 Atl. R. 850; Cook v. Bucklin, 18 R. I. 666, 29 Atl. R. 840; De Wolf v. Middletown, 18 R. I. 810, 26 Atl. R. 44; Barney v. Arnold, 23 Atl. R. 45, 15 R. I. 78; Whitworth v. Stuckey, 1 Rich. Eq. (S. C.) 404; Hoy v. Hoy, 3 id. 394; Gordon v. Gordon, 32 S. C. 563, 11 S. E. R. 334; Bethea v. Bethea, 48 S. C. 440, 441, 26 S. W. R. 716; Ryan v. Monaghan, 99 Tenn. 338, 42 S. W. R. 144; Stones v. Maney, 3 Tenn. Ch. 731; First Nat. Bank v. De Pauw, 75 Fed. R. 775; Britton v. Thornton, 112 U. S. 526, 5 S. Ct. 291; Barber v. Railroad Co., 17 S. Ct. 488, 493; Randall v. Josselyn, 59 Vt. 557, 10 Atl. R. 577.

¹See cases cited in last note. If

§ 847. **The invalidity for remoteness of an executory devise of the fee on an indefinite failure of issue after a devise of the fee simple.**—An executory devise of the fee which is to vest in interest and possession *after the indefinite failure of the issue of a person to whom a prior estate in fee simple*, not in fee tail, is given, is a conditional limitation which is void for remoteness. The indefinite failure of issue may *never* take place at all, or it may not take place until the expiration of the period within which the fee must become alienable¹ under the rule forbidding perpetuities. Until the issue of the first taker of the fee has become wholly extinct, the executory devise of the fee does not vest. The primary devisee can only convey a defeasible fee, which is to come to an end upon an indefinite failure of his issue. And until that event takes place the executory devisee cannot convey the fee, for until then his interest is wholly contingent. There is therefore no person in existence who possesses the power of making an absolute conveyance of the fee simple of the property. On the other hand, an executory devise, or a contingent remainder coming after an estate tail, though dependent upon the general or indefinite failure of issue of the tenant in tail, is not invalid for remoteness of vesting, because the tenant of the estate tail has full power at any time, by suffering a common recovery, to convey the estate tail and to bar all subsequent limitations.²

there is a devise of land to A. in fee simple, with a devise of the fee to B. upon the failure of A.'s issue, and it appears that a *definite failure of A.'s issue* was meant; i. e., that A. shall die leaving him *surviving no issue*, the devise of the fee to B. is valid as an executory devise. The future estate devised to B. cannot be impeached for remoteness of vesting, for the fee will vest absolutely in any event at the death of A. A. takes a base or conditional fee, which on his death leaving issue vests in them *absolutely* as a fee simple, and is then alienable. On the other hand, if he die *leaving no issue*, the executory devise of the fee vests *at once* in the devisee over. The limitation

over is therefore valid as an executory devise of the fee under the statute of wills, but not as a contingent remainder at the common law, for a contingent remainder cannot at common law be limited after a fee. *Mo-Leod v. Dill*, 9 Fla. 427; *Glover v. Condell*, 163 Ill. 566, 45 N. E. R. 173; *Strain v. Sweeney*, 163 Ill. 603, 45 N. E. R. 201; *Davenport v. Kirkland*, 156 Ill. 169; *Smith v. Kimball*, 153 Ill. 368, 38 N. E. R. 1029; *Jones v. Sotheran*, 10 Gill & J. (Md.) 259; *Patterson v. Madden* (N. J. Eq., 1896), 36 Atl. R. 273; *Armstrong v. Douglass*, 89 Tenn. 219, and cases cited in note 1, p. 1274. See also §§ 875-878.

¹ § 882.

² *Post v. Rohrbach*, 142 Ill. 600, 32

§ 848. **The failure of the testator's issue means a definite failure of issue.**—A testator who, *having no issue when he makes his will*, devises land to A. “in default of issue of himself,” means a definite failure of his own issue. He means if he shall leave no issue at his death the land is to go to A. The devise to A., though a contingent devise, is immediate and upon condition, and is to vest *at once* in A. upon the death of the testator *if he leave* no issue, and to be *at once* defeated if he leave issue. The devise to A. is not a future gift by way of a contingent remainder after a fee tail, or an executory devise after a fee which may possibly be invalid for remoteness.¹ Some of the cases place reliance upon the fact that the testator has no issue when he makes the will. But where he had issue then living who survived him, the same construction has been had. Thus where the testator, having several sons and one daughter living at the date of his will, and also at his death, devised to A. a reversion to which he was entitled under a marriage settlement upon the death of his children “in case of failure of issue male of his body,” the court decided that a failure of issue at the death of the testator was meant, and that the gift to A. was a valid, immediate gift, and not an executory devise upon an indefinite failure of issue.² The circumstances of the testator's family should always receive full attention, and may indicate what estate he meant to go to the issue in case he left any surviving. And it may also be remembered that if the testator is unmarried when he makes his will, his subsequent marriage and birth of issue may, by revoking the will, render its construction wholly unnecessary.

§ 849. **Definite failure of issue is meant by a devise over on death without issue under majority.**—The words “dying without issue” undoubtedly mean dying without issue surviv-

N. E. R. 687; *Fisk v. Keene*, 18 Pa. St. 72; *Malcolm v. Malcolm*, 3 Cush. (Mass.) 472; *Nightingale v. Burrell*, 15 Pick. (Mass.) 104; *Condict v. King*, 18 N. J. Eq. 475; *Wright v. Brown*, 116 N. C. 26, 22 S. E. R. 313; *Toman v. Dunlop*, 18 Pa. St. 72; *Haines v. Witmer*, 2 Yerg. (Tenn.) 400; *In re Lowman*, 2 Ch. 348, 12 Report, 362; *Fisher v. Webster*, L. R. 14 Eq. 283;

Badger v. Lloyd, 1 Salk. 232; *Moore v. Parker*, 1 Lord Raymond, 37; *Carter v. Bentall*, 2 Beav. 551; *Lepple v. Ferrard*, 2 My. & Russ. 378.

¹ *French v. Caddell*, 3 B. P. C. Toml. 257; *Wellington v. Wellington*, 4 Burr. 2165.

² *Sanford v. Irby*, 3 B. & Ald. 654; *In re Rye's Settlement*, 10 Hare, 106.

ing, where the death without issue is to take place during the minority of the primary devisee of the fee. Thus a devise to A. in fee, but if he shall die *without issue and under twenty-one years of age*, then over, gives A. a defeasible fee, with an executory devise over on a definite failure of issue, which only vests in case of the happening of *both* events. The fact that death without issue, to vest the devise over, must necessarily take place *before* A. attains majority, shows that death with a definite failure of issue is intended. If, therefore, A. attains his majority, or dies under twenty-one years of age leaving issue, the devise over is defeated, and the fee becomes a fee simple, in the first case in A., and in the other case in his issue. And as has been elsewhere explained,¹ if the direction is in case of A.'s death under age, *or* without issue, the courts will substitute the word "and" for "or" to carry out the evident intention of the testator that A. and his issue, if he leave any, shall benefit.²

§ 850. A definite failure of issue meant by a devise over to persons then surviving.—If the devise over on a failure of the issue of a devisee in fee is to the survivor or survivors of a class of which the primary devisee is a member, it will of necessity be presumed that the testator must have meant a definite failure of issue. This would be the case where the testator gives property in fee to his sons, and on the death of any to his issue, and, if either should die without issue, his share to the survivors. And, aside from this, the fact that a limitation over on a failure of issue is to a person *living at the death of the testator*, and that it will vest, if at all, during the period of a life or lives in being, will prevent any objection being raised to the gift upon the grounds of remoteness of vesting. In such case the first taker has a fee defeasible on his death without

¹ See § 366.

² *Tennell v. Ford*, 80 Ga. 707; *Sayward v. Sayward*, 7 Me. 175, 181, 182; *Raborg v. Hammond*, 2 id. 42, 54; *Ray v. Enslin*, 2 Mass. 53, 54; *Hunt v. Hunt*, 11 Met. (Mass.) 88; *Prosser v. Hardesty*, 101 Mo. 593; *Shimer v. Shimer*, 50 N. J. Eq. 300; *Harrison v. Bowe*, 8 Jones' (N. C.) Eq. 478, 481; *Kelso v. Dickey*, 7 W. & S. (Pa.) 279; *Brewer v. Opie*, 1 Call (Va.,

1798), 184, 185; *Hinde v. Lyon*, 3 Leon. 64; *Eastman v. Baker*, 1 Taunt. 174, and cases cited in § 366. The same rule is applied where "dying without issue" is used in connection with "dying without leaving a husband or wife;" and where there is a devise over in case the first devisee of the fee shall die either before or after attaining his majority. *Glover v. Monckton*, 3 Bing. 18.

issue surviving, with an executory devise over, which vests in possession upon his death without issue him surviving.¹

§ 851. **The meaning of the failure of issue at or after the death of the primary taker of the fee.**—Whether a limitation over expressly in terms “on the death” of the life ten-

¹ Williams v. Graves, 17 Ala. 62; Clark v. Terry, 34 Conn. 176; Burton v. Beach, 30 Ga. 638; Atwell v. Barney, Dudley (Ga.), 207; Daniel v. Daniel, 28 S. E. R. 167, 168 (Ga.); Summers v. Smith, 127 Ill. 645, 21 N. E. R. 191; Kellett v. Shepard, 139 Ill. 433, 28 N. E. R. 751; Lombard v. Witbeck, 173 Ill. 396, 51 N. E. R. 61; Pate v. French, 23 N. E. R. 673, 122 Ind. 10; Deboe v. Lewen, 8 B. Mon. (Ky.) 616; Louisville Ass'n v. Trust Co. (Ky.), 29 S. W. R. 866; Hall v. Priest, 6 Gray (Mass.), 18; Gray v. Bridgforth, 4 Geo. (Miss.) 312; Rucker v. Lambdin, 20 Miss. 31 (1849); Naylor v. Godman, 109 Mo. 543, 19 S. W. R. 56; Fairchild v. Crane, 13 N. J. Eq. 105; Den v. Cook, 7 N. J. L. 41; Sherman v. Sherman, 3 Barb. 385; Dumond v. Stringham, 26 Barb. (N. Y.) 104; Cutter v. Doughty, 23 Wend. 513; Moffatt's Ex'rs v. Strong, 10 N. Y. 11, 12; Norris v. Beyea, 13 N. Y. 273; Chrystie v. Phyfe, 19 N. Y. 345; Zollicoffer v. Zollicoffer, 4 Dev. & Bat. (N. C.) L. 438; Baird v. Winstead (N. C., 1898), 31 S. E. R. 390; Beasley v. Whitehurst, 2 Hawks (N. C.), 437; Bird v. Gillam (N. C., 1898), 31 S. E. R. 267; Threadgill v. Ingram, 1 Ired. (N. C.) L. 577; Deihl v. King, 6 Serg. & R. 32; Rapp v. Rapp, 6 Pa. St. 49; Lapsley v. Lapsley, 9 Pa. St. 130; Caldwell v. Skilton, 13 Pa. St. 152; Wall v. McGuire, 24 Pa. St. 248; Bedford's Appeal, 40 Pa. St. 18; Sheet's Appeal, 52 Pa. St. 257; Ingersoll's Appeal, 86 Pa. St. 240; Manchester v. Durfee, 5 R. I. 549; Lowry v. O'Brien, 4 Rich. Eq. (S. C.) 262; Cox v. Buck, 5 Rich. (S. C.) 604; McCorkle v. Black, 7 Rich. L. (S. C.) 407; Sydnor v. Sydnor, 2 Munf. (Va.) 263; Cordle v. Cordle, 6 Munf. (Va.)

455; Gish v. Moomah, 89 Va. 345, 15 S. E. R. 868; Jackson v. Chew, 12 Wheat. (U. S.) 153, 163; Lippett v. Hopkins, 1 Gall. 460; Lewis v. Claiborne, 5 Yerg. 369; Turner v. Ivie, 5 Heisk. (Tenn.) 232; Williams v. Turner, 10 Yerg. (Tenn.) 289; Greenwood v. Verdon, 1 K. & J. 74. In the last case cited, the court, by Wood, V. C., says: “When the gift is upon the death of the first taker without issue to the then surviving legatees, that is, to those persons named in the will who should then be surviving, it cannot be a transmissible interest which is given to them; and the only interest which they could take must be one which would accrue, in their surviving the specified period, and therefore it must necessarily be a personal benefit that was intended for those legatees; and the period at which it was to take effect being upon the failure of the issue of a preceding devisee, I cannot regard the limitation as pointing to an indefinite failure of issue, but a failure which might take place in the life-time of those legatees named in the will.” A devise to a son, “his heirs and assigns, forever,” is limited by another clause in the will providing that, “in case of the decease of any one of my said children without issue living at the time of such decease, the devise or bequest given to such child I give and bequeath in equal shares to the surviving brothers or sisters of said deceased;” and, on the death of the son without issue, the land devised to him passes in equal shares to his brothers and sisters then living. O'Brien v. O'Leary, 64 N. H. 332, 10 Atl. R. 697.

ant, in case he shall die without issue, means a definite or indefinite failure of issue, has been much discussed. As regards real estate, the limitation over to A. and his heirs, and if A. should die without issue then "*on his death*," or "after" his death, a devise of the fee to another, it was held that A. took a fee simple conditional, with an executory devise over on a definite failure of issue him surviving.¹ But in other cases where the language of the will was similar, the direct contrary of this was held.² So where the devise was to A. in fee, and "*after his death*" to another in case he should leave no issue, the courts decided that "after his death," "at his death," or similar words, did not point out a definite failure of issue, but they meant an indefinite failure of issue, and that A. took an estate tail by implication. But on the other hand, the words *at* or *after the decease of A.*, the first devisee, are permitted their full operation, in a disposition of personal property, as showing that a definite failure of issue was intended. Thus in an early case³ where chattels were given to a person, and "*after her decease*," if she should die without issue, to another, the words meant "dying without issue *surviving*;" and this authority has been followed in many English decisions where the words "after," "immediately after," or "at the death of," have been employed in disposing of personal property.⁴ It is very well settled that the word "then" coming after a failure of issue does not have the effect of making it a definite failure of issue. Thus, in the case of a limitation if A. should die without issue, the words "then and in that case" are not restrictive. The word "then" is not an adverb of time, but a conjunction connecting the two limitations, meaning not "at that date," but "in that event," or "if that happens," that is, if it happens there is a failure of issue.⁵

¹ King v. Frost, 3 B. & A. 546; Ex parte Davies, 2 Sim. (N. S.) 114.

² Jones v. Ryan, L. R. 9 Ir. Eq. 249; Walter v. Drew, Com. R. 373; Doe d. Cook v. Cooper, 1 East, 229.

³ Pinbury v. Elkin, 1 P. W. 2 Vern. 758, 766, Pre. Ch. 488.

⁴ Stratton v. Payne, 3 B. P. C. Toml. 99; Wilkinson v. Smith, 7 T. R. 555.

⁵ Per Lord Brougham, Campbell v. Harding, 2 R. & My. 411; Pye v. Linwood, 6 Jur. 619; Josetti v. McGregor, 49 Md. 202, 213; Chism v. Williams, 29 Mo. 288, 298; Mathews v. Daniels, 1 Murph. (N. C.) 42; Porter v. Ross, 2 Jones' (N. C.) Eq. 196; Clifton v. Haig, 4 Des. (S. C.) 330.

§ 852. **Presumption in favor of restricted construction in case of personal property.**—The rule of law by which the phrase “death without issue” is construed to be an indefinite failure of issue is so technical that the courts will seize upon any facts or circumstances to take a will out of its operation. The presumption that the testator intended an indefinite failure of issue is only recognized where the will is absolutely silent. And if it shall clearly appear from the will that he meant a failure of issue living at the death of the parent, his intention will be permitted to go into effect. The same language which would in the case of *real property* be construed as creating an indefinite failure of issue, will in the case of *personal property* be taken as indicating a failure of issue surviving the first tenant.¹

§ 853. **Cross-remainders by implication after failure of issue—Devises in fee and devises in tail distinguished.**—Where the testator devises land to A. and B. as tenants in common in fee tail, with a devise over on an *indefinite failure of issue of both A. and B.*, the law raises cross-remainders by implication as between them. For where a devise is to two or more, as to A. and B. as tenants in common, and to the heirs of their bodies, and a devise to C. on the failure of issue of both A. and B., the gift over will take effect *only upon the failure of the issue of all.*² Hence, on the death of any of them without his leaving issue, to whom alone (and not to his heirs general) his share would descend, an intestacy would exist as to his share from the moment of his death down to the death of the last survivor without issue. If the whole property is not to go over to the remaindermen until *all the devisees have died without issue*, there would be no disposition of the share of the first one dying in case he did not leave issue who could take from him. This reasoning, of course, does not apply

¹ Clagget v. Worthington, 3 Gill, Rich. (S. C.) Eq. 202; Marshall v. 88; Edelen v. Middleton, 9 Gill, 161; Rives, 8 Rich. (S. C.) 85; Pritchett v. Usilton v. Usilton, 3 Md. Ch. Dec. 36; Cannon, 10 Rich. Eq. 394; Brummet v. Barber, 2 Hill (S. C.), 543, 551.
² Doe d. Gorges v. Webb, 1 Taunt. 234; Powell v. Howells, L. R. 3 Q. B. 655; Hannaford v. Hannaford, L. R. 7 Q. B. 116.
 Woodland v. Wallis, 6 Md. 151; Al-
 lender v. Sussan, 33 Md. 11; More-
 house v. Cotheal, 2 Zab. 430; Porter
 v. Ross, 2 Jones' (N. C.) Eq. 196;
 Clapp v. Fogleman, 1 Dev. & Bat. (N. C.) Eq. 466; Perry v. Logan, 5

at all where the first devisee has a fee simple in the real property or an absolute interest in the personal property; for the testator has parted with all his interest absolutely to each of the primary devisees, *upon the sole condition* that, in case they shall *all* die without issue, it shall then go over to another. Each and all take a qualified or determinable fee, which is absolute in the heirs of each of them upon his death leaving issue, and in that event the executory devise over is defeated. Hence the share of any devisee dying without issue will go to his heirs or personal representatives until all shall have deceased without leaving issue, when it will go to the executory devisee, or until some one of them has died leaving issue, in which event the determinable conditional fee becomes an absolute fee simple. Therefore, where the testator has given an absolute interest in real or personal property to several as tenants in common, with an executory devise over on the death of *all* without issue, no necessity for cross-remainders between them exists, as there would be no intestacy in the event of any dying without issue.¹ But, on the other hand, though the gifts be absolute in terms, yet, if they are contingent and not vested, with a gift over on the death of all without issue or under age, no necessity for cross-remainders will exist.²

Thus, where a man devised land to five sons and to their heirs male, and "*if all five should die without issue*" then over, it was held that the survivor of the five was entitled to the whole.³ In America the same rule is applied to gifts in fee to several persons as tenants in common, with a limitation over if they should die without issue.⁴ Accordingly, where the gift was to *A. and B., their heirs and assigns*, but if *they* should die without issue then over,⁵ or to *A. and B. with a remainder to their issue*, and remainder on their death to the survivor,⁶ a cross-remainder by implication was created. One or two of the

¹ *Skey v. Barnes*, 3 Mer. 334; *Brownhead v. Hunt*, 3 Jac. & Wal. 459; *Baxter v. Lash*, 14 Beav. 612.

² *Mackell v. Winter*, 3 Ves. 236, 536; *Scott v. Bargeman*, 2 P. Wms. 68.

³ *Dyer*, 303b, 13 Eliz.; *Holmes v. Meynell*, Raym. 452, 2 Show. 136.

⁴ *Allen v. Trustees*, 102 Mass. 262;

Dow v. Doyle, 103 Mass. 489; *Horton v. Archer*, 3 Gill & J. (Md.) 199; *Pierce v. Hakes*, 23 Pa. St. 231; *Kerr v. Vernon*, 66 Pa. St. 326.

⁵ *Lillibridge v. Adie*, 1 Mason C. C. 224.

⁶ *Seabrook v. Mikell*, Cheves (S. C.) Eq. 80.

earlier cases refuse to admit the application of the rule of cross-remainders by implication where the property was devised to more than two.¹ But this distinction has been wholly repudiated by the later cases, and the rule in both England and America is that cross-remainders will be implied to carry out the testator's intention, irrespective of the number of those among whom they are to be raised.² The general rule is that cross-remainders are only to be implied to carry out the manifest intention of the testator. If it shall appear from an express limitation over that the testator has created cross-remainders in express terms on the happening of certain particular events, this may be an indication that he did not desire that such remainders should be employed on the happening of other events.³ This is illustrated in an early case where the testator devised land to A. and B., and in the event of the death of A. before the age of sixteen, her share to B., and if B. should die without issue, then to A. On the death of A. after having attained the age of sixteen, the court held that there could be no implication of a cross-remainder in such case.⁴ And this early case has been subsequently followed in England.⁵ But in other cases it has been held that, inasmuch as cross-remainders are largely a matter of intention, the circumstance of the remainder having been expressly created between the parties, on the happening of particular events, is not decisive that the testator did not intend that similar remainders should be employed on the happening of different events.⁶ If the parties to whom the estate has been limited as tenants in common take different interests, that is if some are tenants in fee, others only for life, the limitation over on failure of issue will give them cross-remainders by implication.⁷ The same rule is applied as to the creation of cross-remainders where property is given to several persons as tenants for life, with a remainder to their respective issue, and a devise over in case of the death of all of them with-

¹ *Gilbert v. Witty*, Cro. Jac. 655, *Cole v. Livingston*, 1 Vent. 224.

² *Hall v. Priest*, 6 Gray (Mass.), 18; *Washb. R. P.*, p. 517; *Hoxton v. Archer*, 3 Gill & J. (Md.) 199; *Wall v. Maguire*, 21 Pa. St. 248.

³ *Clache's Case*, Dyer, 330b.

⁴ *Clache's Case*, Dyer, 330b.

⁵ *Rabbeth v. Squire*, 19 Beav. 70, 77,

⁴ *De Gex & J.* 406.

⁶ *Atkinson v. Barron*, 31 Beav. 277,

³ *D. F. & J.* 339.

⁷ *Vanderplanck v. King*, 3 Hare, 1.

out issue.¹ So, also, the same rule is applied where the devise is to A. and B. in tail as tenants in common, and *in default* of such issue then over.² And the fact that the devise is limited to A. and B. and the heirs of their respective bodies as tenants in common, with a limitation over in default of such issue, does not alter the rule, and there will be cross-remainders among the first class of takers, with a limitation of the whole estate over.³

¹ In re Ridge's Trusts, L. R. 7 Ch. 665; In re Clark, 11 W. R. 871.

² Wright v. Holford, Cowp. 31, 2 Eden, 239; Phipard v. Mansfield, Cowp. 797; Atherton v. Pye, 4 T. R. 710.

³ Watson v. Foxon, 2 East, 36, 40; Comber v. Hill, 2 Stra. 969; Williams v. Brown, 2 Stra. 996; Doe d. Gorges v. Webb, 1 Taunt. 234, 238; Green v. Stephens, 17 Ves. 64, 75.

CHAPTER XLIII.

THE VESTING OF FUTURE DEVISES AND LEGACIES.

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§ 854. Definition, classification and characteristics of contingent remainders.—The reader will pardon us if we insert at this point a few of the elementary principles of law governing contingent remainders. Though these principles are tolerably familiar to the majority of members of the profession, a

short recapitulation of them may be of value where one is unexpectedly called upon to give an opinion of the character of a future limitation, and the recognized authorities in this department of the law are not within reach.

A contingent remainder is one which is limited to vest upon the happening of some event which is dubious and uncertain, and hence may never happen at all, or may only happen after the particular estate is at an end; or which is given to a non-existent person or to a non-existent class of persons.¹ "Contingent or executory remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event, so that the particular estate may chance to be determined and the remainder never take effect."² Many classifications of contingent remainders have been attempted. They are divided by Mr. Blackstone into two classes. The first class of contingent remainders comprises those which are to vest upon the happening of some *dubious and uncertain event*. The second class includes those which are limited to *some dubious and uncertain person or persons*. In the first class we may arrange contingent remainders which are to vest upon the prior termination of the particular estate by some uncertain event, which does not, of necessity, abridge or destroy it. Under the second class of contingent remainders are included all limitations in remainder to persons who are unborn at the death of the testator, as, for example, to the heirs of a person who is described as then alive,³ and also remainders limited to uncertain persons, as to the survivors of several persons named, or to a class, or to the surviving members of a class.⁴ Independently of modern statutory modifications, it is the rule that a future estate, whether vested or contingent, if it is to operate as a common-law remainder, must be created by the same instrument and at the same time as the particular estate which is to support it and which precedes it. And a contingent remainder must vest, if at all, either during the

¹ 4 Kent, Com., p. 198. For other definitions, see *Robinson v. Palmer*, 89 Me. 128, 35 Atl. R. 1037; *Harvard College v. Balch*, 171 Ill. 275, 280; *Spear v. Fogg*, 87 Me. 182, 139; *Robinson v. Palmer*, 96 Me. 246, 248.

² 2 Black. Com., p. 168.

³ See §§ 612, 857.

⁴ *Post*, §§ 864, 865.

continuance of the particular estate or *at once* at its termination. This is the consequence of the rule that at the common law the fee could not be in abeyance.¹

Hence, it follows that if the particular estate comes to an end, or if it is destroyed before the contingent remainder has vested, the remainder is also destroyed. Thus, in the earlier common law, if a life tenant alienated his freehold by feoffment, or a tenant in tail alienated by fine, all contingent remainders coming after him were by this action destroyed. But courts of equity have always favored contingent remainders, particularly when they were contained in wills; and no contingent remainder can be destroyed by a transfer of the particular estate by means of any conveyance which, like a bargain and sale deed, operates solely as an equitable conveyance under the statute of uses.

Again, a contingent remainder could not as such be created by a common-law conveyance, as by a feoffment, to take effect, that is to vest, upon the happening of an event which prematurely brought the particular estate to an end. If a future estate in land was by its terms to vest upon the happening of any event which defeated, abridged or destroyed the preceding estate, it would not be valid as a common-law contingent remainder, though it might be valid as a conditional limitation, or as an executory devise when it was created by a will.²

§ 855. The perpetuity created by a contingent remainder. When a contingent remainder is created by a *common-law feoffment with livery of seizin to the life tenant*, the fee or inheritance is said to be in abeyance, because there is no one in whom it would vest absolutely, until the contingent event happens upon which the remainder in fee will become vested.³ But where a contingent remainder or an executory devise is

¹ Plowden, 25, 28; Co. Litt. 49 a, b; Archer's Case, 1 Co. 68; Chudleigh's Case, 1 Co. 138. "There must be no interval or mean time between the particular estate and the remainder supported by it. If the particular estate terminates before the remainder can vest, the remainder is gone forever, for a freehold interest cannot, according to the common law,

commence *in futuro*." 4 Kent, Com., p. 242. And see also *post*, § 881.

² See *ante*, § 480, and *post*, § 874.

³ 4 Kent, Com., p. 252; Chudleigh's Case, 1 Co. 135. The rule in Shelly's case was introduced to avoid the great inconvenience which will result in such cases. See *ante*, § 655 et seq.

created *in a will which certainly does not operate by feoffment* and by actual livery of seizin, but under the statute of wills, the inheritance, unless disposed of by a residuary devise, descends to the heirs of the testator, to remain with them until the contingency happens; for in equity it was admitted, at least after the creation of uses and trusts, and the passage of the statutes of uses and of wills, that estates of freehold might be created by will or as uses to commence *in futuro*.¹ In the case of an executory devise of a freehold to begin *in futuro* without any particular estate created to support it, the fee descends to and remains vested in the heirs of the testator, subject to being defeated as soon as the executory devise shall vest.² The same rule is applicable to all conveyances of the fee which operate not by feoffment, but under the statutes of uses or of wills. And the great importance of this rule in the United States of America lies in the fact that conveyances by feoffment and with livery of seizin are universally abolished; and bargain and sale deeds, and other conveyances which depend for their validity upon the statute of uses or upon some similar statute, have been substituted for conveyances by feoffment and livery. By the creation of a contingent remainder by means of a common-law feoffment, the fee or inheritance was regarded as having been absolutely parted with by the feoffor; and, as there was no one in being in whom it could vest absolutely, it was held of necessity to be in abeyance.³ The doctrine of abeyance resulted in the greatest inconvenience. Logically no person could, until the contingent remainder vested, convey with livery of seizin; for a contingent remainder, viewed from a common-law standpoint, was not regarded as an actual estate until it had vested. It was a mere possibility of having an estate in the future, and as such it was not assignable; for a contingent remainder could be conveyed at common law only by way of estoppel, which was either by record, as by a fine and common recovery, which destroyed it, or by deed, as by a grant.⁴ In equity, however, all contingent interests, whether common-law remainders, future or contingent uses, or executory devises, were always assign-

¹ *Ante*, §§ 777, 778.

² See § 874 et seq.

³ *Post*, § 881.

⁴ Co. Lit. 352a; *Weale v. Lower*, Pollexfen, 54, 61; 4 Kent, Com. 254.

able by conveyances operating under the statute of uses; and also by wills if they were of an inheritable nature, and the person or persons to take had been ascertained. But where the ultimate remaindermen or executory devisees were not *in esse*, or were not ascertainable until the happening of the contingency, the future disposition of property was a mere possibility not coupled with an interest, and it was not assignable either in law or equity.¹

The rule of the older law that contingent interests cannot be transferred save by an estoppel by deed, or by a conveyance operating under the statute of uses, is now generally repealed by statutes in very many of the states. In many of the states all estates in expectancy, whether they are vested or contingent, are descendible, devisable and assignable, according to their nature and duration, by the ordinary deeds of conveyance which are required in the case of vested estates. Elsewhere contingent and executory interests which are not estates may be conveyed if the contingency upon which they are to vest is not as to the person in whom the future estate shall vest.² But where the contingency upon which the ultimate enjoyment of the remainder depends is the survival of the remaindermen until the termination of the particular estate, as when it is to "children living at the death of A.," who is the tenant for life, the remainder is neither assignable nor transferable, and a purchaser on execution takes no title.³

§ 856. The happening of the contingent events.—Although the law favors vested estates, both in real and personal property, a future and executory devise, or a legacy which is to vest upon the happening of some contingent event, will not vest unless the contingency happens *precisely as described* by the will. So, also, two or more events upon the happening of which *concurrently* an estate is to vest must happen precisely as indicated.⁴ The contingent events must coincide in character and in the order of their occurrence with those which are

¹ *Roe v. Jones*, 1 H. Black. 30; 4 345; *Dunn v. Sargent*, 101 Mass. 336; Kent, Com., p. 255; and *ante*, §§ 49–51. *Robinson v. Palmer*, 96 Me. 246, 38

² *Wilkinson v. Sherman*, 45 N. J. Atl. R. 10; *Rosenau v. Childress*, 111 Eq. 413, 18 Atl. R. 228; *Roundtree v. Ala.* 214, 20 S. R. 95.

Roundtree, 26 S. C. 450, 2 S. E. R. 474. ⁴ See *ante*, § 486, as to the strict

³ *Putnam v. Story*, 132 Mass. 207, performance of conditions.
211; *Nash v. Nash*, 12 Allen (Mass.),

required by the terms of the testator's language of limitation. Thus, if the testator has provided for the distribution of his estate upon the happening of one or more contingent events at the termination of a prior existing vested estate, and none of the required events happens exactly as provided for, the court cannot, by supplying dispositive words or the language of gift or of devise, dispose of the estate upon the happening of another event, though *that* is nearly similar to the events which have been mentioned. This rule of construction is illustrated by a future provision for the children of A. *then living, i. e.*, at the termination of a vested life estate, but if *one such child* only survive, and there be *no surviving issue of any deceased child*, then to that child, and there is a surviving child *and* also the surviving issue of one or more deceased children. The devise does not vest in the children of A., for the condition of affairs actually existing is not the one provided for by the testator, and as the future gift was contingent upon a state of affairs which cannot now exist, the testator is *pro tanto* intestate.¹ And this rule is likewise well illustrated by an executory devise to A. in case B. shall die under the age of twenty-one and without issue.² Here B.'s death must take place under twenty-one, and the deceased must also leave no issue at his death, or the contingent devise will fail.

An estate, whether in fee or for life, which is vested either in interest or in possession, but which is subject to being divested upon the concurrence of two or more contingent events, will not be divested unless *all* the necessary contingent events shall happen precisely as described in the will. Thus, if a vested interest is to determine and to go to others upon the happening of some event which of itself puts an end to the estate, as in the example above given, the vested estate will not determine until the event shall happen. And, on the other hand, if an absolutely vested interest is, upon the happening of one or more events which are in their nature contingent, to be divested, and then the estate is to go to other persons who up to that time are uncertain or are not persons in being, the vested interest will not be divested, unless it shall appear that the devisees over who are to take are ascertained at that time.

¹ *Shuldham v. Smith*, 6 Dow. 22, by Lord Eldon and Lord Redesdale.

² See *ante*, § 467.

This is so, although the contingent event has happened upon which the prior interest was defeasible.¹ Accordingly, under this rule, where a remainder is devised to A. and B. by name as individuals, equally to be divided between them at the death of the life tenant, or *to the survivor of them*, and *both* die during the life tenancy, the remainder, being vested, is not divested. The representatives of A. and B. each take an equal share. The remaindermen take vested estates at the death of the testator, subject to be divested by the fact that one only survives, and he is to take all if he survive. As the only event which can possibly defeat the share of any remainderman has not and cannot happen, the share of none is divested.²

§ 857. **The character of remainders to heirs.**—The construction of future gifts to the heir or heirs when they are to take as purchasers under the will is so fully and exhaustively treated in another portion of this work,³ that little remains to be said here. A remainder to the heirs of a life tenant (in those states where the rule in Shelly's case is repealed) is a contingent remainder, for *nemo est hæres viventis*, and, if the life tenant shall die without any heirs, the remainder is gone.⁴ But very often the word "heirs," in the case of a remainder to the heirs of the life tenant, will be construed to mean his children,⁵ in which case the children will usually take a vested remainder as a class.⁶ Thus, a remainder to the "heirs of the marriage of the testator by his present wife and to heirs of the former marriage of the said wife" of the testator means "children of those marriages," and such children have been held to take contingent remainders.⁷

Whether a remainder devised to the heirs of the testator himself shall be vested or contingent depends always upon the ex-

¹An illustration of the rule of the text is found in *Wood v. Mason*, 17 R. I. 99, 20 Atl. R. 264, which was a devise of a life estate to A., but if A. died before the testator *and* childless then over, and A. survived the testator, but died leaving no children. The court held that the devise over did not vest, as it was dependent on a double contingency, *i. e.*, that A. should predecease the testator and *also* that he should die childless.

²*Browne v. Kenyon*, 3 Mad. 310; *Bell v. Slack*, 1 Kee. 238.

³§§ 606-633.

⁴*Larmour v. Rich*, 71 Md. 166, 18 Atl. R. 702; *Putnam v. Gleason*, 99 Mass. 454; *Richardson v. Wheatland*, 7 Met. (Mass.) 169.

⁵*Ante*, §§ 616, 617.

⁶See also § 558.

⁷*Maguire v. Moore*, 108 Mo. 267, 18 S. W. R. 897.

act wording of the will. If by "heirs" the testator means those persons who are his heirs *at his death* (which is the customary construction),¹ those persons take a vested estate in remainder. On the other hand, where it is clear that, by a reference to his heirs, the testator means those persons *alone* who would be his heirs if he had *died at the termination of the life estate*, the remainder to his heirs would probably be construed as contingent until that event.²

In conclusion it may be said that a remainder to the heirs of a person other than the testator, but who takes nothing himself under the will, is always contingent until the death of that person.³ Where the ancestor is alive at the execution of the will and he dies *before the testator*, those who are his heirs and who also survive until the death of the testator take a vested remainder.⁴ Where the ancestor is *alive at the death of the testator*, the class doctrine is applied, and all who would be his heirs if he died immediately take a contingent remainder, as a class, subject to open and let in others born to him during his life. Then, upon his death before the life tenant, those who are his heirs take a vested remainder, the possession only being postponed until the death of the life tenant.⁵

¹ *Ante*, §§ 610, 613.

² *Bunting v. Speck*, 41 Kan. 421; *Walker v. Dunshee*, 38 Pa. St. 439; *Donohue v. McNichol*, 61 Pa. St. 73; *Johnson v. Jacob*, 11 Bush (Ky.), 646; *Rich v. Waters*, 22 Pick. (Mass.) 563; *Sears v. Russell*, 8 Gray (Mass.), 86.

³ 2 Black. Com., pp. 169, 170; *Preston v. Brant*, 96 Mo. 552, 10 S. W. R. 78; *Ryan v. Monaghan*, 99 Tenn. 338, 42 S. W. R. 144; *Hall v. Nute*, 38 N. H. 422.

⁴ *Persons v. Snooks*, 40 Barb. (N. Y.) 144; *Campbell v. Rawdon*, 18 N. Y. 412; *Preston v. Brant*, 96 Mo. 552, 10 S. W. R. 78; *Tillinghast v. Cook*, 9 Met. (Mass.) 143.

⁵ *Moore v. Littell*, 41 N. Y. 66. And see also *ante*, § 612, and the early case of *Danvers v. Earl of Clarendon*, 1 Vern. 35, and *Bullock v. Bullock*, 2 Dev. Eq. (N. C.) 316. Before it can be decided whether a testator has or has

not succeeded in creating a valid contingent remainder by a devise to a person for life with remainder to the heirs or to the heirs of the body of the life tenant, it is necessary to ascertain to what extent, if at all, the court construing the will is bound by the rule of law known as the rule in *Shelly's case*. This rule, which has been fully discussed in another portion of this work, is as follows: If an ancestor takes an estate for life and an immediate remainder is limited thereafter in the same instrument to his heirs, or to the heirs of his body, the words "heirs" or "heirs of his body" are not words of purchase, but words of limitation, and the fee vests at once in the ancestor. The words "heirs" or "heirs of his body" do not create a contingent remainder where the rule is in operation, but the life tenant takes an estate in fee or in fee

§ 858. Conditional limitations and remainders which are dependent upon the remarriage of a tenant for life.— Elsewhere it is explained that a devise by the testator to his widow for her life, but, if she should remarry, then over to others in fee, *without any provision for the disposition of the fee* after her death, where she does *not* remarry, gives the devisee over a remainder in the latter event by implication, the courts inserting the proper words for such a limitation.¹ The point here to be considered is whether a devise of the future estate, on the marriage of the widow, *simpliciter*, is a conditional limitation, valid only under the statute of wills and contingent solely upon the remarriage of the widow, so that if she shall die without having remarried it will be defeated; or whether it is a remainder, vested or contingent, according to circumstances, which is to take effect in any case on her death, if she shall die without having remarried.

The question is an old one and frequently arises. The difficulty is caused by the fact that an estate which is given for life, in express terms, is to be terminated by a contingent event; *i. e.*, the marriage of the life tenant. Under such circumstances it may seem that the devise over is contingent and should take effect *only if the prior life estate is terminated by marriage*, and that it should be defeated if it is not. Thus, where land was devised to the widow of the testator “*for life, but upon the express condition that if she should marry*” again the land should go to A. in fee, the estate to the widow was held to be an estate upon condition, and the estate to A. was a conditional limitation, which was dependent upon the contingency of remarriage by the widow,² and where the widow did not remarry the devise over did not take effect. But the majority of the decisions have not thus construed such a limitation. In an early case where the limitation was to the widow expressly for life “*if she should not marry again, but if she did, then to A.*,” the court held, on the widow’s death without having married again, that the devisee over had a vested remainder in fee which was de-

tail, as the case may be. On the other hand, where the rule in Shelly’s case has been repealed, a remainder to the heirs or to the heirs of the body of the tenant for life is a valid contingent remainder until the death of the ancestor. For a discussion of the rule in Shelly’s case, see *ante*, §§ 655-668.

¹ *Ante*, § 472.

² *Sheffield v. Lord Orrery*, 3 Atk. 282.

pendent on the life estate in the widow.¹ The distinction between the two cases or classes of cases is difficult to apprehend so far as mere words are concerned. The solution is to seek the intention from the whole will. If it shall appear that the testator meant to give an estate for life upon a condition subsequent that the devisee should not remarry, the devise over is then a conditional limitation contingent upon that event alone, *i. e.*, remarriage, which defeats the prior estate, and if that does not happen the devise over never vests.² But where it appears to be the primary intention of the testator to give the widow an estate in limitation for widowhood, which may of course endure for the life of the widow, the devise over is a vested remainder coming after the life estate of the first taker.³ So where land is devised to the widow for life, remainder in fee to B., but *if the widow shall remarry then she is to forfeit a portion of the land*, B. does not take a vested remainder during the life of the widow in the land forfeited, but that interest goes to the heirs at law of the testator.⁴ On the other hand, if the will expressly provides that the property, which was given to the widow of the testator "*for her life, provided she remains unmarried*," shall immediately upon her marriage go to the remainderman, he will take a vested estate in possession in that event, and, if it is a fee, it will not be defeated by his death during the life of the widow.⁵ So, where the testator has directed that, on the remarriage of his widow, land

¹ Luxford v. Cheeke, 3 Levinz, 125; Gordon v. Adolphus, 3 B. P. C. Toml. 306, where the words of the will were to the widow "during her natural life, that is to say, so long as she shall continue unmarried, but in case she shall choose to marry, then, and in that case," to others, and in case of her death without issue then over. It was held that this last bequest over did not depend upon the event of her marriage.

² See *ante*, § 508.

³ Thrasher v. Ingraham, 32 Ala. 645; Chappell v. Avery, 6 Conn. (1826), 31; Aulick v. Wallace, 75 Ky. 531, 535; McKensey v. McKensey (Ky., 1895), 28 S. W. R. 782; Ferson v. Dodge, 23

Pick. (Mass.) 287, 293; Manderson v. Lukens, 23 Pa. St. (1854), 31; Biddle's Appeal, 69 Pa. St. 190; Farmers' Bank v. Hoof, 4 Cranch, C. C. 423; Browne v. Hammond, Johns. (Eng.) 210, 213; Underhill v. Roden, L. R. 2 Ch. Div. 494. A limitation after a direction to pay an unmarried woman the income of a fund for life, "provided if she marry," then over, is valid and vested and takes effect on her death, she never having married. Meeds v. Wood, 19 Beav. 215.

⁴ Augustus v. Seabolt, 3 Met. (Ky.) 156, 160. Cf. Bennett v. Packer (Conn., 1898), 39 Atl. R. 739.

⁵ Boyd v. Sachs, 78 Md. 491, 28 Atl. R. 391.

which he had given her for life should be forfeited and sold, and the proceeds divided among certain persons named, "or who may be living at the death of the widow," the court, to promote an early vesting, ordered a sale and distribution at once, on the widow's remarriage, among the remaindermen then living.¹

§ 859. **Remainders dependent upon the death of a life tenant without surviving issue or children.**—A remainder as such, whether vested or contingent, cannot properly be limited after a fee simple.² Hence a remainder over on the death without issue of a person to whom land is given in fee is void where a definite failure of issue is meant. And though an executory devise, dependent upon a failure of issue, is valid where the testator means a definite failure of issue,³ neither an executory devise nor a remainder after an indefinite failure of the issue of one who has the fee is valid, because the contingency upon which it is to vest is too remote and the vesting is indefinitely suspended.⁴ A remainder coming after a life estate in A., which is dependent upon the death of A. without leaving children at his death, or which depends on a failure of issue *living at his death*, is valid. If the remainderman is *in esse* at the death of the testator the remainder is vested, though the testator has seen fit to give the fee as a remainder to the children or issue of the life tenant who may survive him. The remainder to B., on failure of children or issue of A., is subject to be divested by A.'s leaving children surviving him.⁵ Thus, where the limitation was by will to a son of the testator for *his* life, and, upon his death, remainder to his issue absolutely, but if he leave no issue then remainder in fee to B., it was held that B. took a vested remainder, subject to being divested by the birth of issue to A. if they survive the life tenant; but that, on B.'s death in the son's life, the remainder descended from B. to his heirs, and vested in possession on the death of the son without surviving issue.⁶ So, also, where the devise

¹ *Bainbridge v. Cream*, 16 Beav. 25. *O'Driscoll v. Koger*, 2 Des. (S. C.) 295;

² §§ 874, 875.

³ *Ante*, § 844 et seq.

⁴ *Ante*, § 847.

⁵ *Lepps v. Lee*, 92 Ky. 16, 16 S. W. Mass. 312, 39 N. E. R. 1112.
R. 346; *Dunn v. Sargent*, 101 Mass. 336, 338; *Hopkins v. Jones*, 2 Pa. St. 69;

Buist v. Dawes, 4 Strobb. Eq. (S. C.)

37, 38; *Pinney v. Fancher*, 3 Bradf.

(N. Y.) 198. *Cf. Lee v. Welch*, 163

Mass. 312, 39 N. E. R. 1112.

⁶ *Hills v. Barnard*, 152 Mass. 67, 25

N. E. R. 96.

was to E. for life, remainder to her children in fee, but *if none at her death*, then remainder to her brother, and the brother died before E., it was held, upon the death of E. leaving no children, that the remainder was vested and that it might be legally claimed by the heirs of the brother, but that it was not devisable by E.¹ And the same construction has been followed² *where there was no express devise of the fee in remainder to the children of the life tenant* whom he should leave at his decease. Thus, where land was given to A., who was the son of the testator, "during his natural life, and in case he should die leaving no child or children, then to the surviving children or grandchildren of the testator," the court held that the children of the testator living at his death and the children of the testator's deceased children took vested remainders, subject to being divested by the death of A. leaving children. In the latter event A.'s children took remainders, though nothing had been expressly devised to them.³

Many cases, however, may be found in which it has been held that a remainder, which ordinarily would be considered vested, will be rendered contingent by the fact that it is limited to follow after the death of the life tenant without issue or without children him surviving. Thus, where a remainder is devised to the issue of the tenant for life, but if he shall die without issue, meaning without leaving issue at his death, then remainder to B. for life, remainder to the children of C., the remainder to B. is vested, while that to the children of C. is contingent until B.'s death, A. having died during B.'s life without issue.⁴ So a devise to A. for life, remainder to his children living at his death, if they attain majority, or die leaving issue under majority, but if none attain majority or die leaving issue, then remainder to the children of B., gives the

¹ *Garrison v. Hill*, 79 Md. 5, 28 Atl. R. 1062. See also *Goodright v. Jones*, 4 Maule & Sel. 88; *Lewis v. Waters*, 6 East, 336.

² But on this point compare cases cited *ante*, § 468.

³ *Kilgore v. Kilgore*, 127 Ind. 276, 26 N. E. R. 66. And see cases cited, p. 621, note 2.

⁴ *Nathan v. Hendricks*, 34 N. Y. S. 1016, 87 Hun, 483; *In re Baer*, 41

N. E. R. 702, 147 N. Y. 348. See also, sustaining the text, *Naylor v. Godman*, 109 Mo. 543, 19 S. W. R. 56; *Woelper's Estate*, 126 Pa. St. 562, 24 W. N. C. 233, 17 Atl. R. 870; *Taylor v. Taylor*, 63 Pa. St. 481; *Losey v. Stanley*, 147 N. Y. 560, 42 N. E. R. 8; *May v. Gest*, 14 S. & R. (Pa.) 40; *Jenour v. Jenour*, 10 Ves. 562; *Roe d. Sheers v. Jeffery*, 7 T. R. 589.

latter class a contingent remainder and not an executory devise.¹ A devise of a remainder to the children of the life tenant, but if none survive him, then to "the grandchildren of the testator, their heirs and assigns forever," gives the grandchildren of the testator living at his death a contingent remainder as a class, which opens to let in after-born grandchildren, but which is defeated by the death of the life tenant leaving children.² In conclusion it may be said that a limitation over upon the death of a life tenant without children, when, if he has any surviving, they are to take a vested remainder, does not refer solely to death in the life-time of the testator, as would usually be the case if the devise was to the devisee in fee, and on his death without children *then over*.³

§ 860. **Vested remainder defined.**—A vested remainder is one, says Chancellor Kent, "*when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment.*"⁴ The uncertainty that the remainder will ever vest in possession in the remainderman named will not render it contingent, if there be a person in being in whom it would vest if the precedent estate were to come *at once* to an end. If the remainder is in fee, and it is vested in A., the fact that he dies during the life of the tenant of the life estate does not divest the remainder, but A.'s estate in the remainder descends to his heirs, and they may enter into possession at the termination of the particular estate.⁵ So, too, a remainder to B. and the heirs of his body is a vested remainder in B. in fee tail, though it may happen that B. dies without heirs of his body before the life tenant. It is the present capacity of the remainder to take effect in possession which makes it a vested remainder. But, on the other hand, if it be uncertain whether the remainder will ever vest in any person at all, the remainder is contingent.

¹ Demill v. Reid, 71 Md. 175, 17 Atl. R. 1014.

² Beckley v. Leffingwell, 57 Conn. 163, 17 Atl. R. 766; St. John v. Dann, 34 Atl. R. 110, 66 Conn. 401. The construction of devises over upon the death of the prior taker in fee under age or without issue, and when "or" is changed into "and," is considered at length in § 366.

³ Hollister v. Butterworth (Conn., 1898), 40 Atl. R. 1044.

⁴ 4 Com., p. 194.

⁵ Saxton v. Webber, 83 Wis. 617, 626; Hills v. Barnard, 152 Mass. 67; McCarty v. Fish, 87 Mich. 48, 49 N. W. R. 518; Clarkson v. Pell, 17 R. L. 646, 24 Atl. R. 110. See also § 346.

The simplest example of a vested remainder is a devise to A. for his life, and after or at his death the fee is to go to B. and his heirs, and A. and B. are both living at the death of the testator.¹ But few limitations are worded so simply or so plainly as this, and the difficulty, in construing the language of the will, of ascertaining whether the testator intends to give a vested or a contingent interest, is very great. The line of demarcation between vested and contingent future estates is very fine and discernible often only with great difficulty. Whenever it is possible the future interest will be construed as vested, and hence alienable and devisable by the remainderman.² It is not so much the certainty or the uncertainty of the enjoyment of the fee in remainder after the life estate ends as the uncertainty of the person who has a present right to enjoy the future estate if the particular estate came to an end now, which determines the character of the remainder. A remainder is vested if the remainderman, being *alive*, *will take at once if the life tenant were to die*. The fact that his enjoyment is postponed, and, on a certain event, as on his death, may never take place at all, does not make the remainder contingent. But where there is no person now in being upon whom the enjoyment and possession of the remainder would devolve as a remainderman, if the particular estate were to terminate, the remainder is contingent. Where a vested remainder is devised

¹ As in *Perrine v. Newell*, 49 N. J. Eq. 57.

² "A vested remainder is one limited to a certain person or a certain event, so as to possess a present capacity to take effect in possession should the possession become vacant." *Crews' Adm'r v. Hatcher*, 91 Va. 378, 21 S. E. R. 811. A good example of this would be a remainder to A. upon the death of B. without issue living at his death. So, it is said, "where a remainder is limited to take effect in possession, if ever, immediately on the determination of the particular estate, which estate is to determine by an event that must happen unavoidably by the efflux of time, the remainder vests in interest as soon as the remainder-

man is *in esse* and ascertained; provided nothing but his death before the determination of the particular estate will prevent such remainder from vesting in possession. Yet, if the estate is limited over to another in the event of the death of the remainderman before the determination of the particular estate, his vested estate will be subject to be divested by that event; and the interest of the substituted remainderman, which was before either an executory devise or a contingent remainder, will, if he is *in esse* and ascertained, be immediately converted into a vested remainder." By the court, in *Blanchard v. Blanchard*, 1 Allen (Mass.), 227.

to A., with a disposition of the fee to C. upon the death of the remainderman without issue, it will be presumed, in the absence of a contrary intention clearly shown, that the death of A. without issue during the life of the particular tenant is meant, and, upon A. surviving the life tenant, he will take absolutely.¹

§ 861. **An early vesting is favored by the law.**—Under the rule elsewhere explained,² by which a modern will speaks as of the date of the death of the testator, every gift to a person who is alive at that date vests at once, in the absence of an expression of an intention that the vesting shall be postponed. It will be presumed, when the testator does not expressly or by implication indicate that the vesting of the title to his bounty is to be postponed, that he means it to vest at once upon his death. His silence upon this point will raise a conclusive presumption that the interest in the gift is to vest as soon as the instrument by which it is given shall take effect, which, under the general rule, is at his death. And if the person who is to take is not alive at his death, the title will vest as soon as he comes into being, for the law in every case favors an early vesting. *No future or executory limitation will be regarded as contingent which may, consistently with the intention of the testator gathered from the whole will, be deemed vested.* The presence of the language of contingency, as in the phrase “if they be living,” or to those who “may then be living,” or in similar language, is to be considered, though such phrases are by no means conclusive, as they may refer to the *entering into the possession* as well as to the *vesting of the title*. If the terms of the will are equivocal or ambiguous on this point, they ought to be construed to favor the vesting of the title at

¹See *ante*, § 846, p. 465, for cases cited upon this point. “If it is clear that certain persons now living have a right to take possession at the determination of the life estate, or at any time when it becomes vacant, the remainder is vested. As, if A. by will devised his real property to B., his wife, for and during her life, and at her death to his legal heirs; and at the death of A. he had two sons, and

these were living at the death of B. Here are two certain determinate persons to take possession. In this example, both the contingency upon which the possession depended, and the persons who had the capacity to make the will effectual by their right of possession, were fixed, definite and certain.” Simpson, J., in *Bunting v. Speck*, 41 Kan. 424, 431.

²§ 14.

as early a date as possible. Where the time when the interest shall vest is in doubt because the testator has used words which may mean either of two dates, the earlier date is to be selected.¹ This rule, that the executory estate shall be construed to be vested rather than contingent, whenever the former construction is possible, is the result of that other very old rule of the common law, that the fee shall never be in abeyance if it can possibly be avoided. Future estates, if contingent, are not assignable at the common law, though the person to take is in being.² A vested remainder in fee is always assignable, though the possession is postponed until after the death of the life tenant. Now that future *contingent* interests are also assignable in equity and devisable under the statute of wills, at least where the person who may ultimately take the fee in possession is in being, the old principle of avoiding an abeyance is not so applicable. But the rule which favors a vesting seems to be invoked by the modern cases with all its ancient force.³

¹ *Savage v. Burnham*, 17 Ala. 119; *Walkerly's Estate*, 108 Cal. 627, 41 Pac. R. 772; *Peters v. Spillman*, 18 Ill. 370; *People v. Jennings*, 44 Ill. 488; *Valentine v. Ruste*, 93 Ill. 585; *Nicoll v. Scott*, 99 Ill. 529; *Lambert v. Harvey*, 100 Ill. 338; *Davidson v. Koehler*, 76 Ind. 398, 409; *Harris v. Carpenter*, 109 Ind. 540, 544; *Davidson v. Bates*, 111 Ind. 391, 398; *Amos v. Amos*, 117 Ind. 37, 38; *Bruce v. Bissell*, 119 Ind. 524, 529; *Heilman v. Heilman*, 129 Ind. 59, 63; *Wills v. Wills*, 85 Ky. 486, 3 S. W. R. 900; *Phillips v. Johnson*, 14 B. Mon. (Ky.) 172; *Deering v. Adams*, 37 Me. 264, 273; *Brown v. Lawrence*, 3 Cush. (Mass.) 390, 397; *Gardiner v. Guild*, 106 Mass. 25, 28; *Miles v. Boyden*, 3 Pick. (Mass.) 213; *Pike v. Stephenson*, 99 Mass. 188; *Eldridge v. Eldridge*, 9 Cush. (Mass.) 516, 518; *Peck v. Carlton*, 154 Mass. 230, 233; *Blanchard v. Blanchard*, 1 Allen (Mass.), 223, 225, 226; *Marsh v. Hoyt*, 161 Mass. 459, 461; *Nash v. Cutler*, 16 Pick. (Mass.) 491; *Minot v. Harris*, 132 Mass. 528, 529; *Rivenett v. Bourquin*, 53 Mich. 10; *McCarty v. Fish*, 87 Mich. 48; *Hall v. Wiggin* (N. H., 1896), 29 Atl. R. 671; *Campbell v. Rawdon*, 18 N. Y. 412; *Livingston v. Greene*, 52 N. Y. 118; *Titus v. Weeks*, 37 Barb. (N. Y.) 126; *Moore v. Lyons*, 25 Wend. (N. Y.) 119; *Chafee v. Maker*, 17 R. L. 739, 24 Atl. R. 773; *Smith's Appeal*, 23 Pa. St. 9; *Passmore's Appeal*, 23 Pa. St. 381; *Young v. Stoner*, 37 Pa. St. 165; *McClure's Appeal*, 72 Pa. St. 414; *McCall's Appeal*, 86 Pa. St. 284; *Hubbert's Estate*, 6 Pa. Dis. R. 96; *Baker v. McLeod*, 79 Wis. 534, 541; *Scott v. West*, 63 Wis. 529, 552, 562, 564, 565; *Croxall v. Shererd*, 5 Wall. (U. S.) 287, 288; *Pond v. Allen*, 15 R. L. 171, 2 Atl. R. 302.

² *Ante*, § 855.

³ "There is a prevalent disposition by all the courts, upon the ground of general policy, to favor vested, rather than contingent, remainders; and consequently, where there arises from the terms of the conveyance a grave doubt as to whether the remainder vested at the death of the deviser, or should remain expectant

§ 862. The judicial leaning in favor of vested gifts where the testamentary disposition is residuary.—The presumption which arises from the fact of the execution of a will, that the testator in making it did not mean to die intestate as to any portion of his property, strengthens the presumption in favor of the vesting of gifts when the gift is a disposition of a residue. Language which ordinarily would be construed as creating contingent gifts, if employed in relation to specific legacies or devises, or particular gifts not included in a general or residuary clause, will in the case of a residuary clause be construed as creating vested interests.¹

§ 863. Examples of remainders which have been held to be vested.—A devise to A. for life, remainder to his oldest son;² a devise in remainder to the son of a life tenant “provided he shall care for his father so long as he lives;”³ or of a remainder to A. upon condition of his making a payment during his pos-

and contingent until the happening of a future event, the doubt is always resolved in favor of a vested remainder. Many well-considered cases assert a still stronger rule in favor of vested remainders, by holding that all estates in remainder are to be treated as vested, except in a devise in which a condition precedent to the vesting is so clearly expressed that the court cannot treat it as vested without doing so in plain contradiction to the language of the will. Another rule, so often expressed that we find it everywhere in the books, but probably included in those already stated, is that no remainder will be construed contingent which may, consistently with the words used or the intention expressed, be deemed vested.” *Bunting v. Speck*, 41 Kan. 424, 438.

¹ The authorities which sustain the presumption against intestacy are without number. A few only of the most recent are here cited, though these, it may be noted, are more applicable to the general rule than to the question of vesting. *Higgins v. Dwen*, 100 Ill. 554, 558; *King v. King*,

48 N. E. R. 582, 168 Ill. 272, 282; *Hayward v. Loper*, 147 Ill. 41; *Whitcomb v. Rodman*, 156 Ill. 116, 121; *Hawkins v. Bohling* (Ill.). 48 N. E. R. 94, 95; *Taubenhan v. Dunz*, 17 N. E. R. 456, 124 Ill. 524; *Kinney v. Keplinger*, 173 Ill. 449, 458, 50 N. E. R. 131; *Leiter v. Sheppard*, 85 Ill. 242; *Mills v. Franklin*, 128 Ind. 444, 448; *Borgner v. Brown*, 133 Ind. 391, 396; *Cote v. Cronor*, 30 Ind. 292; *Korf v. Gerichs*, 145 Ind. 134, 137; *Groves v. Gulph*, 132 Ind. 186, 188; *Benkert v. Jacoby*, 36 Iowa, 273, 276; *Davis v. Taul*, 6 Dana (Ky.), 51, 52; *Mann v. Hyde*, 71 Mich. 278; *Toms v. Williams*, 41 Mich. 532; *Wales v. Templeton*, 83 Mich. 177, 47 N. W. R. 328; *Coffin v. Peterson*, 71 Me. 596; *Bills v. Putnam*, 64 N. H. 554; *Irwin v. Zane*, 15 W. Va. 646; *Saxton v. Webber*, 83 Wis. 617, 625; *In re Ehle*, 73 Wis. 445, 451; *Cheney v. Plumb*, 79 Wis. 602, 606; *In Matter of Pierce*, 58 Wis. 560, 565.

² *Gardiner v. Guild*, 106 Mass. 25. The son who was oldest at the death of the testator was meant.

³ *Gingrich v. Gingrich*, 146 Ind. 227, 45 N. E. R. 101.

session of the estate;¹ a devise "absolute to B. on the death of A., but if B. shall die in the life of A. then to B.'s heirs;"² a devise of a house "to be given to A." one year after the death of B.,³ or to B. if living at the death of the life tenant, but if not then to another,⁴ or a direction that the land is "to revert to my three children" after the death of my widow,⁵ creates a future gift which vests at the death of the testator. A vested remainder may also be created by terms which shall make it defeasible upon a condition subsequent. Thus, as is shown elsewhere,⁶ a remainder in fee to A., but if he shall die without issue under twenty-one, is vested, but may be defeated upon his death during minority and without issue.⁷

§ 864. **When remainders to classes are vested.**—Because of the principle that the law favors an early vesting, it is a general rule, unless a contrary intention is clearly expressed, that where the testator has given a remainder to a class, which may increase or decrease in numbers during the particular estate, the remainder will vest in those members of the class *who are alive at the death* of the testator, subject to open and let in all after-born members of the class.⁸ The members of the class who are alive at the death of the testator take vested remainders, though the share of each may be diminished by the subsequent birth of new members into the class during the duration of the particular estate.⁹

As the various members of the class are born during the existence of the life tenancy, each takes *at once* a vested remainder, though his enjoyment and possession are postponed. Where the remainder is a *vested remainder in fee to the class*, the death

¹ *Duncan v. Prentice*, 4 Met. (Ky.) 216.

² *Tindall v. Miller*, 143 Ill. 337, 41 N. E. R. 535.

³ *Pond v. Allen*, 15 R. L. 171, 2 Atl. R. 302.

⁴ *Hoover v. Hoover*, 116 Ind. 498, 19 N. E. R. 468.

⁵ *Shipp v. Gibbs*, 88 Ga. 184, 14 S. E. R. 196.

⁶ *Post*, § 867.

⁷ *Hinrichsen v. Hinrichsen*, 172 Ill. 462, 50 N. E. R. 135.

⁸ See cases cited §§ 551–558.

⁹ In 4 Comm., p. 197, Chancellor

Kent says: "Where a remainder is limited to the use of several persons who do not all become capable at the same time, as a devise to A. for life, remainder to his children, the children living at the death of the testator take vested remainders, subject to be disturbed by after-born children. The remainder vests in the persons first becoming capable, and the estate opens and becomes divested in quantity by the birth of subsequent children, who are let in to take vested portions of the estate."

See also *ante*, p. 723, note 1 et seq.

of one of the remaindermen before the death of the life tenant will not divest his share. And the deceased remainderman's interest will descend to his heirs if he has not disposed of the fee by his will. The share of each member of the class, being vested, is also assignable and devisable during the existence of the particular estate, subject to diminution as to the amount or quantity which the remainderman or his heirs will ultimately receive by reason of the class being subject to open and let in after-born members.¹

¹ *Rosenau v. Childress*, 111 Ala. 214, 20 S. R. 95; *Bull v. Bull*, 8 Conn. 49; *Johnson v. Webber*, 33 Atl. R. 506, 65 Conn. 501; *Belfield v. Booth*, 63 Conn. 299, 27 Atl. R. 585; *Nelson v. Pomeroy*, 29 Atl. R. 534, 64 Conn. 257; *Crawley v. Blackman*, 81 Ga. 775, 8 S. E. R. 538; *De Vaughn v. M'Leroy*, 10 S. E. R. 211, 82 Ga. 687; *Kelly v. Gonce*, 49 Ill. App. 82; *Kilgore v. Kilgore*, 127 Ind. 276, 26 N. E. R. 56; *Heilman v. Heilman*, 28 N. E. R. 310, 129 Ind. 59; *Moore v. Hare* (Ind., 1897), 43 N. E. R. 870; *Fleming v. Ray*, 86 Ga. 533, 12 S. E. R. 944; *Burnside v. Wall*, 9 B. Mon. (48 Ky.) 321; *Winter's Estate*, 114 Cal. 186; *Arnold v. Arnold*, 11 B. Mon. (Ky.) 93; *Downes v. Long*, 79 Md. 382, 29 Atl. R. 827; *Young v. Robinson*, 11 Gill & J. (Ky.) 328; *Waters v. Waters*, 24 Md. 430, 446; *Dulaney v. Middleton*, 72 Md. 67, 19 Atl. R. 146; *Taylor v. Mosher*, 28 Md. 443, 455; *Straus v. Rost*, 67 Md. 465, 10 Atl. R. 74; *Devemon v. Shaw*, 16 Atl. R. 645, 70 Md. 219; *Winslow v. Goodwin*, 7 Met. (Mass.) 381; *Lombard v. Willis*, 147 Mass. 13, 16 N. E. R. 737; *Parker v. Converse*, 5 Gray (71 Mass.), 336; *Shattuck v. Stedman*, 2 Pick. (Mass.) 468; *Weston v. Foster*, 7 Met. (Mass.) 297, 299; *Vallard v. Vallard*, 18 Pick. (Mass.) 41; *Dingley v. Dingley*, 5 Mass. 537. See also other Massachusetts cases cited in note 1, page 732; also *Adams v. Woolman*, 50 N. J. Eq. 516, 26 Atl. R. 451; *Budd v. Haines*, 52 N. J. Eq. 488, 29 Atl. R. 170; *Van Gieson v. Howard*, 7 N. J. Eq. 462; *Ward v. Tompkins*, 30 N. J. Eq. 3, 4; *Parker v. Hover*, 42 N. J. Eq. 559, 9 Atl. R. 217; *Cook v. McDowell*, 53 N. J. Eq. 351; *Thomae v. Thomae* (N. J., 1889), 18 Atl. R. 355; *Hana v. Osborn*, 4 Paige (N. Y.), 336, 342; *Van Vechten v. Pearson*, 5 Paige (N. Y.), 512; *Tanner v. Livingstone*, 12 Wend. (N. Y.) 83; *Ramsay v. De Remer*, 65 Hun (N. Y.), 212, 20 N. Y. S. 143; *Teed v. Morton*, 60 N. Y. 506; *Stevenson v. Lesley*, 70 N. Y. 512, 517; *Bowditch v. Ayrault*, 33 N. E. R. 1067, 138 N. Y. 222; *ante*, pages 732 and 733, notes; *Goggins v. Flythe*, 113 N. C. 102, 18 S. E. R. 96; *Meares v. Meares*, 4 Ired. L. (46 N. C., 1844), 192, 196; *Robinson v. McDiarmaid*, 87 N. C. 455; *Minnig v. Batdorf*, 5 Pa. St. 503; *Ross v. Drake*, 87 Pa. St. 373; *Thoman's Estate*, 29 Atl. R. 84, 161 Pa. St. 444; *Snyder's Estate*, 180 Pa. St. 70; *In re Fetrow*, 58 Pa. St. 424; *Rudebaugh v. Rudebaugh*, 72 Pa. St. 271; *Hinkson v. Less*, 181 Pa. St. 225, 232, 87 Atl. R. 338; *McGregor v. Toomer*, 2 Strobb. (S. C.) L. 51; *Crossby v. Smith*, 3 Rich. Eq. (S. C.) 244; *Ballard v. Connors*, 10 Rich. Eq. (S. C.) 389, 392; *Schoppert v. Gillam*, 6 Rich. Eq. (S. C.) 83; *Alexander v. Walsh*, 3 Head (40 Tenn.), 493; *Owens v. Dunn*, 85 Tenn. 131; *Harris v. Alderson*, 4 Sneed (Tenn.), 254; *Frierson v. Van Beuren*, 7 Yerg. (Tenn.) 606; *Franklin v. Franklin*, 91 Tenn. 119; *Cooper v. Hepburn*, 15 Gratt. (Va.) 558; *Chapman v. Chapman*, 90 Va. 409, 18 S. E. R. 913; *Rowlett v. Rowlett*, 5 Leigh (Va., 1834),

§ 865. Contingent remainders to classes.— The rule of construction just stated in application to remainders to classes may yield before a clear indication of a contrary intention in the will, from which it is manifest that the testator intends to postpone the vesting of the class gift until the death of the life tenant. If from the language of the will it is clear that the

20, 28; *Martin v. Kirby*, 11 Gratt. (Va.) 67, 71; *Stone v. Nicholson*, 27 Gratt. (Va.) 16, 18; *Scott v. West*, 63 Wis. 529, 564; *Clarke's Estate*, 3 De Gex, J. & S. 111; *Stewart v. Sheffield*, 13 East, 526; *Faulding's Trusts*, 26 Beav. 263; *Comberbach v. Perryn*, 32 T. R. 484; *Shortbridge v. Creber*, 5 Barn. & Cress. 866, 8 Dow. & Ry. 718; *In re Hiscoe*, 48 L. T. (N. S.) 510; *Turner v. Hudson*, 10 Beav. 222, 224; *Viner v. Francis*, 2 Bro. C. C. 658; *Lunt v. Lunt*, 108 Ill. 307; *Grimmer v. Freidrich*, 164 Ill. 245, 45 N. E. R. 498; *Harris v. Carpenter*, 109 Ind. 540, 544; *Hoover v. Hoover*, 116 Ind. 498, 500; *Losey v. Stanley*, 147 N. Y. 560, 42 N. E. R. 8; *Gilpin v. Williams*, 25 Ohio St. 283; *Yeaton v. Roberts*, 28 N. H. 459; *Butterfield v. Haskins*, 33 Me. 392, 393; cases cited under §§ 349, 546 and 558, *ante*. The rule of the text is not only applicable to a remainder to the children of the life tenant as a class, but also where, after the life estate, the remainder is to go to another class in no way connected with him. Thus, where the remainder is to the children of B. after a life estate in A., all B.'s children who are alive at the death of the testator, and all who are born during the life of A., take vested remainders as soon as born. "Where a gift is to a class of individuals in general terms, as to the children of A., and no period is fixed for the distribution of the legacy, the time for distribution will be the death of the testator; and hence only children born or begotten prior to and *in esse* at that time will be entitled to share in the distribu-

tion. But where the distribution is, by the terms of the will, to be made at some time subsequent to the death of the testator, the gift will embrace not only all children living at the death of the testator, but also all those who shall subsequently come into existence before the period of distribution; and, if the bequest is a present bequest, the beneficiaries who are *in esse* at the death of the testator will take vested interests in the fund, but subject to open and let in after-born children who shall come into being and belong to the class at the time appointed for the distribution. Where the period of distribution is postponed until the attainment of a given age by the children, the gift will apply only to those who are living at the death of the testator and who shall have come into existence before the first child attains the age named, being the period when the fund is first distributable in respect to any one object or member of the class. Where the members of a class take vested interests in a legacy distributable at a period subsequent to the death of the testator, but subject to open and let in after-born children, they take their vested shares subject to the distribution of those shares as the number of the members of the class is increased by future births; and on the death of any of the children previous to the period of distribution, their shares will go to their respective representatives." By *Paige, J.*, in *Tucker v. Bishop*, 16 N. Y. 402, 404.

testator meant that only those persons *who may compose the class at the death of the tenant for life* shall take anything in possession or enjoyment, the remainder to the class is contingent. All members of the class who are alive at the death of the testator, and all who are born during the life estate, take contingent remainders; and when the contingency is that only those members of the class shall enjoy the remainder in possession who are alive at the death of the life tenant, the remainder, not being descendible, is neither assignable nor devisable during the existence of the particular estate.

Words of survivorship are not, as is elsewhere explained,¹ always conclusive upon the point whether a remainder is vested or contingent. Though the courts, as a general rule, will in most cases refer the language of survivorship to as early a date as possible consistent with the expressed intention in the will, such terms as "to the children *then surviving*," to children "*then living*," or to A., B. and C. and the "survivor of them,"² may prevent the vesting of a remainder or other future devise at the testator's death, and show that it is meant to be contingent until the death of the life tenant. Accordingly where the testator, after he has devised a life estate to A., upon A.'s death devises the remainder in fee to A.'s children "*then living or then surviving*,"³ or after a life estate gives a remainder to "my own children *then living*,"⁴ or "to my children or the *survivor of them at the death of A.*,"⁵ or to my *surviving brothers and sisters*,⁶ or to my *surviving nephews*,⁷ the conclusion is almost irresistible that the devise of the future interest does not vest at the testator's death, but is contingent upon the devisees living to acquire the actual possession.⁸ The members of the class

¹ *Ante*, §§ 349-352.

² *Ante*, § 351.

³ *McGraw v. Davenport*, 6 Port. (Ala.) 319; *Putnam v. Story*, 132 Mass. 207, 211; *Nash v. Nash*, 12 Allen (Mass.), 345; *Dunn v. Sargeant*, 101 Mass. 336; *Robinson v. Palmer* (Me., 1896), 38 Atl. R. 10; *McGillis v. McGillis*, 49 N. E. R. 145, 154 N. Y. 532.

⁴ *Hopkins v. Keazer*, 89 Me. 347, 36 Atl. R. 615; *Roundtree v. Roundtree*, 26 S. C. 450, 2 S. E. R. 474.

⁵ *Spear v. Fogg*, 87 Me. 132, 32 Atl. R. 791.

⁶ *In re Winters*, 114 Cal. 186, 45 Pac. R. 1063.

⁷ *Denny v. Kettell*, 135 Mass. 138, 139.

⁸ See the following cases in support of the text: *Bethea v. Bethea* (Ala., 1897), 22 S. R. 520; *William v. Caldwell* (Iowa, 1897), 71 N. W. R. 214; *Moore v. Hare* (Ind., 1896), 43 N. E. R. 870; *Hempstead v. Dickson*, 20 Ill. 193, 195; *Spear v. Fogg*, 87 Me. 132, 139; *Mercantile Trust Co. v. Brown*, 71 Md. 166, 17 Atl. R. 937; *Thomson v. Ludington*, 104 Mass. 193; *Howland*

who are alive at the death of the testator take contingent remainders, which vest in possession only in case they survive the life tenant. In other words, only those persons who are alive at the death of the life tenant form the class which is ultimately to possess and enjoy the property to the exclusion of the heirs of those members of the class who have died during the interval between the death of the testator and the death of the life tenant.¹ Where two or more estates for life follow one another in succession, as to A. for his life, then to B. for life, and to C. for his life, with a remainder to children or to any other class "*then*" living or *then* surviving, the adverb of time refers to the death of the *last named life tenant whenever his death may occur*. In the above limitation it would not mat-

v. Howland, 11 Gray (77 Mass.), 469; Coveny v. McLaughlin, 148 Mass. 576, 20 N. E. R. 165; Hills v. Barnard, 152 Mass. 67, 25 N. E. R. 56; Emerson v. Cutler, 14 Pick. (Mass.) 108; Olney v. Hull, 28 Pick. (38 Mass.) 311, 314; Nash v. Nash, 12 Allen (Mass.), 345; Hurlburt v. Emerson, 16 Mass. 241; Eberts v. Eberts, 42 Mich. (1879), 404; Union Association v. Montgomery, 70 Mich. 587, 595; Van Tilburgh v. Hollinshead, 14 N. J. Eq. (1861), 32, 35; Slack v. Bird, 20 N. J. Eq. 238; Williams v. Chamberlain, 10 N. J. Eq. 373; Jones' Will, 46 N. J. Eq. 554, 45 N. J. Eq. 426; Paget v. Melcher, 156 N. Y. 399; In re Allen, 151 N. Y. 243, 45 N. E. R. 554; Campbell v. Stokes, 36 N. E. R. 811, 142 N. Y. 23; Burrill v. Shiel, 2 Barb. (N. Y.) 457; Moore v. Lyon, 25 Wend. (N. Y.) 119; Mullarkey v. Sullivan, 136 N. Y. 227; Newell v. Nichols, 75 N. Y. 78; Gibson v. Walker, 20 N. Y. 476; Mowatt v. Carow, 7 Paige (N. Y.), 328, 339; Smith v. Black, 29 Ohio St. 488, 498; Haskins v. Tate, 23 Pa. St. 249; Durant v. Nash, 30 S. C. 184, 9 S. E. R. 474; Kansas C. L. Co. v. Hill, 3 Pickle (Tenn.), 589; Schoppert v. Gillam, 6 Rich. Eq. (S. C.) 83; Dwight v. Eastman, 62 Vt. 398, 20 Atl. R. 398. And consult also on the same point the authorities cited on page 470 et seq., and page 730, note 2.

¹ A remainder to A., B. and C., "as many of them as are alive at the death of D., and if any die leaving issue, such issue to take the parent's share," is a contingent remainder with a double aspect. It vests only at the death of D. in the remainderman and the issue of those deceased. Whitesides v. Cooper, 20 S. E. R. 295, 115 N. C. 570. The contingency upon which a remainder to the children of a life tenant "*living at his death*" depends is that the children shall survive their father. As soon as a child is born he becomes one of a class which is to take the property in possession at the end of his father's estate. His share may be increased or diminished during his father's life by the birth or death of others into the class; but it can never be completely destroyed except by his own death before that of his father, the tenant for life. See also *ante*, p. 723, note 1. Though land be devised to the testator's *children by name*, a direction to divide it, after the death of a prior life tenant, among the children *then living*, will render the remainder contingent. The issue of a child who dies during the life tenancy takes nothing. Wilhelm v. Caldwell (Iowa, 1897), 71 N. W. R. 214.

ter, so far as the vesting of the remainder in the class is concerned, whether C. survives the prior tenants for life or not. Those persons who form the class at *his* death take a vested remainder, though that may take place during the prior life estates so that C. may never survive to become possessed of his life estate. And where C. dies in the life-time of the testator, those who form the class at the death of the testator take vested remainders.¹

But, on the other hand, in many cases a remainder to the *surviving members of a class* vests at once on the death of the testator in those who *then* compose the class, and in such case the class does not open to let in after-born members. This construction is particularly applicable to a devise of a remainder to the "*surviving children*" of the testator.² All members of the class surviving the testator take a vested remainder, which, upon the death of any member before the life tenant, descends to his heirs. This is the case where, for example, a remainder is given after the death of A. to the "*surviving brothers and sisters*" of the testator,³ or when a fund was to be divided "*among the children of the testator then living.*"⁴ So also where a remainder was devised to six children *by name*, with a proviso that the share of any child dying without issue should go to his or *her surviving brothers and sisters*, the children of one who dies *after* the testator, leaving issue, were let in.⁵

§ 866. Vested interests may be created by directions for the future division of land or of money, or for the future payment of a legacy.—A direction to divide land, or the pro-

¹ Olney v. Bates, 3 Drew. 319.

² Grimmer v. Friedrich, 45 N. E. R. 498, 164 Ill. 245; Union Ass'n v. Montgomery, 70 Mich. 587, 595; Porter v. Porter, 50 Mich. 456; Smith v. Black, 29 Ohio St. 488, 498; Anderson v. Smoot, Speer's Eq. (S. C., 1844), 312; Ballard v. Connors, 10 Rich. Eq. (S. C., 1859), 389, 392; Swinton v. Legare, 2 McCord Eq. (S. C., 1822), 440; Reams v. Spann, 26 S. C. 561, 2 S. E. R. 412; Cresson's Appeal, 76 Pa. St. 19; Satterfield v. Mayes, 11 Humph. (Tenn.) 58, 60; Wornock v. Smith, 11 Humph. (Tenn.) 478; Jones v. Knappen, 63 Vt.

391; Lombard v. Willis, 147 Mass. 137, 16 N. E. R. 737.

³ Stone v. Lewis, 84 Va. 474, 5 S. E. R. 282.

⁴ Wainwright v. Sawyer, 150 Mass. 118, 22 N. E. R. 885.

⁵ Johnes v. Beers, 57 Conn. 295, 18 Atl. R. 100. A provision that, "upon the death of a life tenant without issue, the remainder should go to a son of the testator, and if he should die then to his heirs," gave the heirs of the son a remainder contingent on the death of the son during the life of the life tenant. Chace v. Gregg, 88 Tex. 552, 32 S. W. R. 520.

ceeds of land, at some future date, as *at* or *after* the death of one who has a life estate in the income, among individuals, and, *a fortiori*, among a class, may, even in case there is *no actual and express devise of the land* to the individuals or to the class, create a vested remainder. A similar direction to pay money, without express words of bequest, may create a vested legacy. These and like directions will create *vested interests* where their meaning is not controlled by the context. The direction to divide, to distribute or to pay implies an actual division, distribution or payment, and not one that is constructive, and hence it will be presumed to refer to the actual enjoyment or to the possession of the land or money which is to be divided or paid. This is usually the presumption where there is *nothing more than a direction to pay or to divide or distribute*, and it would most assuredly be the true construction where there is an absolute devise of land in the form of a remainder, with a direction for a division or partition to take place at or after the termination of the particular estate.¹

Thus, where there was *no absolute and express gift* of the land, but the trustees of the will were directed to sell it and to divide the proceeds among the heirs of the testator after

¹Williams v. Williams, 73 Cal. 99, 14 Pac. R. 394; Thrasher v. Ingraham, 32 Ala. 645; Arnold v. Arnold, 11 B. Mon. (Ky.) 81; Field v. Hallowell, 12 B. Mon. (Ky.) 517; Willett v. Rutter, 84 Ky. 317; Weitekind v. Hallenberg, 88 Ky. 114, 10 S. W. R. 368; Blanchard v. Blanchard, 1 Allen (Mass.), 223; Hogan v. Hogan, 102 Mich. 641, 61 N. W. R. 73; McClure's Appeal, 73 Pa. St. 414; Hedger's Estate, 1 Con. Sur. (N. Y.) 524; Hurlbutt's Estate, 145 N. Y. 535, 40 N. E. R. 226; Goebel v. Wolf, 21 N. E. R. 388, 113 N. Y. 405; Sayles v. Best, 140 N. Y. 368, 36 N. E. R. 636; Bridgewater v. Gordon, 2 Sneed (Tenn.), 5; Hays v. Collier, 2 Sneed (Tenn.), 585; Owen v. Dunn, 85 Tenn. 131, 2 S. W. R. 29; Foley v. Harrison, 84 Va. 847, 6 S. E. R. 144; McArthur v. Scott, 113 U. S. 580; Heilman v. Heilman, 28 N. E. R. 310, 129 Ind. 59; Spencer v. Greene,

17 R. I. 727, 24 Atl. R. 742. Those cases in which there is a gift of a legacy with a superadded direction to pay at some future time, or on the happening of a future event, or a devise of a remainder in land to individuals or to a class with a similar added direction to divide in the future, are to be distinguished from those cases where there is *only* a direction to pay a legacy, or to divide land at a future time or on a future event, and *nothing more than that*. The former are more likely to be construed as vested gifts, other things being equal, than the latter. But, as is abundantly illustrated and proved by the cases cited, there is no conclusive presumption that a mere direction to pay or to divide land or money in the future always creates a contingent and not a vested interest.

the death of A., who had a life estate in it,¹ or where land, devised to the widow of the testator for her life, was directed to be divided among the children of the testator when she should remarry or should die,² or where trustees were, on the death of a life tenant, to convey the property,³ or even where land was to be divided⁴ among the children whom the life tenant may thereafter have,⁵ the remainder is vested and not contingent.⁶

A legacy will the more readily be construed as vested in every case where there is no other gift than a direction to pay or to distribute money, if it is apparent that the payment or the distribution was postponed, not in order that the legatee should personally *perform some act or acquire some personal qualification as a condition precedent* to payment, but where the postponement is clearly intended for the benefit of some one who takes a prior interest, or, in the language of the cases, where the postponement of payment is "*for the convenience of the estate.*" An illustration of this is found where a fund is bequeathed to pay A. the income for life, and on his decease to divide or to distribute among individuals or a class.⁷

But a mere direction to divide, *without other words of gift, does not always*, alone and without words of present gift, create

¹ Sayles v. Bent, 140 N. Y. 368, 35 N. E. R. 636; Thomman's Estate, 161 Pa. St. 444, 29 Atl. R. 84.

² Gest v. Flock, 1 Gr. Ch. (N. J. Eq.) 108.

³ Weston v. Weston, 125 Mass. 268.

⁴ A direction that land of the testator shall be sold as "soon after the death of the testator as it can be done," the proceeds to be invested for the benefit of the wife of the testator during her life, "and after her decease to be equally divided among the children" of the testator, gives the children a vested interest in the money. In re Hurlbutt's Estate, 145 N. Y. 535, 40 N. E. R. 226; 20 N. Y. Supp. 403, affirmed. See also *ante*, §§ 702-704. as to the vesting of lands directed to be sold for distribution.

⁵ Cherbonnier v. Goodwin, 79 Md. 55, 28 Atl. R. 894.

⁶ A devise of the income to the

parent for life, "and at his decease a devise of the principal to his children to be equally divided between them," gives the children who were living at the death of the testator a vested remainder. Lombard v. Willis, 147 Mass. 18, 16 N. E. R. 737. A devise of a remainder to children, "to take effect at the decease of the life tenant," is a vested remainder, and is not dependent upon the survival of the children until the death of the life tenant. Marsh v. Hoyt, 161 Mass. 459, 37 N. E. R. 454.

⁷ The following English cases may be cited: Halifax v. Wilson, 16 Ves. 171; Chaffers v. Abell, 8 Jur. 578; Watson v. Watson, 11 Sim. 73; Packham v. Gregory, 4 Hare, 396; In re Wilson, 14 Jur. 263; Marshall v. Bentley, 1 Jur. (N. S.) 786. The American cases are cited *supra*, p. 1308, n. 1.

a vested remainder. Where the direction to divide among a class indicates no intention to postpone the vesting, the usual rules apply, and the class will consist of those who are alive at the death of the testator, *plus* those who are subsequently born. But where the direction is in express terms, with words of gift, to divide among a *class as it is composed at the death of the life tenant*,¹ as, for example, to divide into as many parts as there may be children or heirs "then living," or surviving;² or where lands are by the testator directed to be sold at the death of the life tenant and the proceeds are *then* to be divided among the *surviving brothers and sisters of the testator*;³ or where a fund is to be equally divided among the children of the life tenant, but if *none at her decease*, then to others;⁴ or where money is to be divided among children and the heirs of those deceased;⁵ or where the direction is merely to divide among a class of unborn persons generally,⁶ the remainder is contingent. And where the direction is to divide among a class, the children of deceased members of the class to take their parents' shares absolutely, and the shares of the members dying without issue at their death are to go over, the remainder is contingent as to the shares of the substitutional class, but vested, though defeasible at least as to the shares of the members of the original class.⁷

A direction to divide among individuals named, with nothing more, *at or after* the termination of a prior estate, will be more readily presumed to give the persons named a vested remainder than a similar direction to divide among a class. Devisees who are named will be conclusively presumed to take vested estates if *in esse* at the death of the testator, unless the vesting is very clearly postponed. The devisees named are fixed in number, while classes are fluctuating as to their membership, and may, consistently with the language of the will, be ascertainable as well at one time as at another.⁸ But a devise to

¹ As to words of survivorship, see *ante*, §§ 349-351.

² *Hopkins v. Keazer*, 89 Me. 347; *Robinson v. Palmer*, 96 Me. 246, 248; *Womrath v. McCormick*, 51 Pa. St. 504; *McGraw v. Davenport*, 6 Port. (Ala.) 319.

³ *In re Winters' Estate*, 114 Cal. 186, 45 Pac. R. 1043.

⁴ *Rosenau v. Childress*, 111 Ala. 214, 20 S. R. 95.

⁵ *Hunt v. Hall*, 37 Me. 363; *Wilson v. Bryan*, 90 Ky. 482, 14 S. W. R. 533.

⁶ *Hale v. Hobson*, 167 Mass. 397, 45 N. E. R. 913.

⁷ *Ante*, § 353.

⁸ See *ante*, §§ 551, 558.

individuals by their names, to be divided at the death of a life tenant, share and share alike, among those of the original devisees "*then living*," is contingent on the survivorship of the devisees, and the descendants of one who dies during the life tenancy take nothing.¹

§ 867. **Vested remainders which are subject to being divested by some future event.**—A remainder may be created which is vested and which is alienable by the remainderman, but which is also liable to be divested by the happening of an uncertain event before he shall take possession. Take as an example of this a remainder to the children of the life tenant as a class, with a provision or a direction that the children, or the issue of any member of the original class, shall take their parent's share in case the parent shall not survive the life estate. This gives the children alive at the beginning of the life estate a vested remainder as a class, subject to let in all children who are born during the life tenancy, though the share of each member of the class is defeasible *as to him individually* by his death during the life tenancy. This remainder, being vested, is alienable, subject to being defeated by the substitution of the members of the secondary class. The remainder in fee to the

¹ *Wilhelm v. Caldwell* (Iowa, 1897), 71 N. W. R. 214. "The distinction between a bequest of money at a particular time specified, and a similar bequest payable or to be paid at the same time, is somewhat refined, and, it is probable, seldom exists in the mind of a testator; but it is established by so long a series of decisions that it must now be regarded as a constituent part of the law, which it is our province and duty to administer. In the second case the gift is reserved and only its payment postponed. In the first the gift itself is postponed. In the language of the books, the time is annexed in the second case to the *payment*, in the first to the *substance* of the gift. The first is a contingent, the second is a vested, legacy. A vested legacy, where the legatee dies before the time fixed for its payment, passes to

his personal representatives, or, if it has been previously assigned by him, to his assignee. A contingent, upon the happening of the same event, is wholly extinguished and sinks into the residuum for the benefit of the residuary legatees or next of kin, and a previous assignment is necessarily defeated, since every such assignment, if otherwise valid, is subject to the same contingency as the gift itself. There is, however, an exception from the general rule that a gift to a particular person is contingent during his life. If during his life a benefit is given to him or to any other person in the capital sum bequeathed, the legacy is construed as a vested remainder, and is not defeated by the antecedent death of the legatee." By Duer, J., in *Andrews v. Amer. Bible Soc.*, 4 Sandf. (N. Y.) 156.

issue or children of the members of the original class is a contingent remainder,¹ whose vesting depends upon the death of the parent before final distribution. As soon as the parent dies leaving children, his share in the remainder vests in them at once, and it is not then defeasible by the death of the substituted remaindermen, unless expressly so directed in the will. Thus, where the testator devised a remainder to his son, and, in case of his son's decease before he came into possession, then to his son's children if any survived him, but if none survived the son, then to a charity, and the son died during the life estate, leaving a child who also died during the life estate, the court held that, as the remainder vested in the grandchild of the testator at once upon the death of his father,² it was not defeated by the grandchild's death before the life tenant.³ On the other hand, it has been held that a devise to A. for life, remainder "to the seven sons of the testator *nominatim*, or to *such of them as may be living at the death* of the life tenant, . . . and if any one of my sons be deceased leaving lawful issue then to that issue," is a remainder with a double aspect. The remainder to each son is contingent; being absolutely defeated by his death without issue, but upon his death leaving issue a substituted remainder will be created in the issue.⁴ And as the

¹ See *ante*, §§ 353, 354, on substitutional gifts.

² See *ante*, § 355, citing cases.

³ *Van Gieson v. White*, 53 N. J. Eq. 1, 30 Atl. R. 331; *Cox v. Handy*, 78 Md. 108, 27 Atl. R. 227, 501. See also *Mercantile Bank v. Ballard's Assignee*, 83 Ky. 481; *Dodd v. Winship*, 144 Mass. 461, 11 N. E. R. 588; *Corey v. Springer*, 138 Ind. 506, 37 N. E. R. 332; *Lenz v. Prescott*, 144 Mass. 505, 11 N. E. R. 923; *Robinson v. Palmer*, 96 Me. 246, 248, 38 Atl. R. 103; *Dunlap v. Fant*, 74 Miss. 197, 20 S. W. R. 874; *Johnson v. Delome Land P. Co.*, 26 S. R. 360 (Miss., 1899); *Tiencken v. Tiencken*, 131 N. Y. 391; *Smith v. Secor*, 157 N. Y. 402, 52 N. E. R. 179; *Mullarkey v. Sullivan*, 63 Hun, 156, 17 N. Y. S. 715; *Lepps v. Lee*, 92 Ky. 146, 17 S. W. R. 146; *Braunsdorf v. Braunsdorf*, 23 N. Y. S. 722; *Nodine*

v. Greenfield, 7 Paige, 544; *Manderson v. Lukens*, 23 Pa. St. 31; *Passmore's Appeal*, 23 Pa. St. 381; *Siddons v. Cockrell*, 131 Ill. 653, 23 N. E. R. 586. *Contra*, *Chew v. Keller*, 13 S. W. R. 395, 100 Mo. 862. Where a remainder is devised to a class with a substituted remainder to the issue or children of those who die before distribution, and no express provision is made disposing of the share of one who dies without issue or children, it was held that the share of one who died without leaving children was not divested. *Cox v. Handy*, 78 Md. 108, 27 Atl. R. 227, 501.

⁴ *Whitesides v. Cooper*, 115 N. C. 570, 20 S. E. R. 295. See also *Crane v. Bolles*, 45 N. J. Eq. 373, 24 Atl. R. 237. A devise to A. for life, remainder to his three children, or to *such as should be alive at his death*, being

remainder in the members of the primary class is not vested absolutely as of the testator's death, but is vested subject to being divested, it cannot be subjected to any incumbrance which the remainderman may attempt to place upon it as against his children or his issue.¹

Where the testator has *not* used words of survivorship indicating that none of the original class shall take unless he shall survive the termination of the life estate, but has simply limited the fee over to the issue of a member of the class leaving issue, without providing for the death of a member of the original class *without children or issue*, the remainder, having vested at the death of the testator, is not divested by the death of a remainderman without issue, unless it is expressly given to others in that event.²

§ 868. **The effect of a power of disposal on a vested remainder.**—A remainder cannot be limited after an estate in fee simple. It matters not how the estate in fee is created, whether by a limitation to one and his heirs, or by a limitation in indeterminate language coupled with an absolute power of disposal;³ and a future limitation coming after such an interest can only be valid, if at all, as an executory devise. But a vested remainder, following after a life estate created in express language, is not rendered contingent by the fact that the life tenant has a power of sale by which he may convey the fee for his support, or for reinvestment, or for any other purpose.⁴ Thus, a gift of the income of a trust fund for life,

vested, is not defeated by the death of *all* the children, though the vested interest is undoubtedly liable to be divested in favor of the survivor or survivors of them, if any there be. *Sturgess v. Pearson*, 4 Madd. 411.

¹ *Straus v. Rost*, 10 Atl. R. 74, 67 Md. 465.

² *Heilman v. Heilman*, 129 Ind. 59, 28 N. E. R. 310; *Moore v. Hare* (Ind., 1896), 43 N. E. R. 870; *Nelson v. Russell*, 135 N. Y. 137, 31 N. E. R. 1008, reversing 16 N. Y. S. 395. A provision for the substitution of the children of a remainderman for the parent who may die before the termination of the life estate leaving

issue, *prima facie* refers to the death of the remainderman during the life estate. See *ante*, § 346. But it may refer to the death of the remainderman during the life of the testator, so that the children of a deceased remainderman who are alive at the death of the testator take their parent's share. *Outcalt v. Outcalt*, 42 N. J. Eq. 500, 8 Atl. R. 532. See also authorities cited *ante*, pp. 729, 730.

³ See *ante*, §§ 858, 685, 686.

⁴ *Welsh v. Woodbury*, 144 Mass. 542, 11 N. E. R. 762; *Sandford v. Blake*, 45 N. J. Eq. 247, 17 Atl. R. 812; *Carter v. Hunt*, 40 Barb. (N. Y.) 88;

with a power in the trustee to pay over the principal to the life tenant at his discretion, but if not, then on his death to pay to other persons, gives the latter vested remainders subject to the exercise of the power to pay over to the life tenant.¹ The conferring or creation of a merely discretionary power in a trustee, or in the life tenant, is not a limitation of the property, for it may never be exercised. But as soon as the power is exercised by the donee or trustee an estate is created which defeats the remainder.²

The remainder vests at the death of the testator to go into possession at the death of the life tenant upon so much of the property as has not been disposed of under the power; and if the remainderman shall die during the continuance of the particular estate and the remainder is in fee, he may devise it, or if he shall die intestate the heirs of the remainderman will take what he would have taken had he survived.³ So, too, a remainder to A., following a life estate in B., where B. has a discretionary power of appointing the fee by will, is a vested remainder, though it may ultimately be wholly defeated by the exercise of the power of appointment.⁴ The remainder vests in A. subject to the exercise of the power by the life tenant; and if he does not appoint, or appoints fraudulently, the remainderman takes in default of a valid appointment.⁵

A direction, "If there should be anything remaining after

Rhodes v. Shaw (N. J.), 11 Atl. R. 116; *Ackerman v. Gorton*, 67 N. Y. 63; *Thomas v. Thomas*, 1 Rawle (Pa.), 112, and cases cited *ante*, § 687.

¹ *Harvard College v. Balch*, 171 Ill. 275, 281; *Lehnard v. Specht*, 180 Ill. 208; *Van Axte v. Fisher*, 17 N. Y. 401, 22 N. E. R. 943.

² See *Railsback v. Lovejoy*, 116 Ill. 442.

³ See *ante*, §§ 687-689.

⁴ *Thorington v. Thorington*, 111 Ala. 237.

⁵ *Cunningham v. Moody*, 1 Ves. 174; *Doe v. Martin*, 4 T. R. 89. The intervention of a power of appointment, general or special, whether the estate be real or personal, will not prevent the vesting of an estate given in de-

fault of the exercise of the power, if, apart from the existence of the power, the estate would be a vested estate. In such cases the estate will vest, subject to be divested by the exercise of the power. *Sandford v. Blake*, 17 Atl. R. 812, 45 N. J. Eq. 247. A devise to A. during widowhood, with a power in her to divide the property on her death among her children, but if she shall fail to do so, then remainder to her three children, gives A. a life estate by implication and her children a vested remainder in fee, subject to being divested either by the death of any child before A., or by her testamentary disposition. *Thorington v. Thorington*, 111 Ala. 237, 20 S. R. 407.

the decease" of a life tenant, to whom the residue is bequeathed in trust for his support, "I give and bequeath such residue and remainder to D., her heirs and assigns forever, provided the amount does not exceed \$3,000," gives D. a vested pecuniary legacy of that amount, if so much remains unexpended.¹ These rules are applicable only where the power is discretionary. If the power to appoint is *imperative* and special, the devisee of the remainder in fee takes nothing where there are persons in existence at the death of the testator to whom the testator has directed the fee to be appointed by the life tenant. As equity will consider that done which ought to have been done, the appointees will take vested interests, which will vest in possession in them upon default of an appointment, to the exclusion of the remaindermen named.²

§ 869. **The vesting of devises and legacies at majority.**—Instances where a legacy is to be paid to, or land is to be divided among, legatees at majority, or at some other specified age, are very numerous.³ The question then arises, does the mention of majority or other age postpone the vesting until the specific age is attained, or is the devise or the legacy vested and the payment only postponed? In an early and leading case⁴ where the testator devised land in trust for the payment of his debts *until such time as his son should reach the age of twenty-one years*, and when his said son should attain that age, then to him in fee, and the son died in his minority, it was determined that the fee vested in the son on the death of the testator, and upon the son's death during minority it descended to his heir. This rule has been generally followed both in England and America. And though in most cases it may happen that the person to whom the legacy is payable at ma-

¹ *Chafee v. Maker*, 17 R. I. 739, 24 Atl. R. 773. For a full citation of cases, see *ante*, § 358.

² *Smith v. Floyd*, 140 N. Y. 337, 85 N. E. R. 606. See also *ante*, §§ 802-804, as to the execution of powers, and §§ 687, 688, as to life estates with powers of disposal.

³ The rules of construction applicable to legacies or devises to children as a class, which are payable when the children attain majority, and

which must be applied in order to ascertain at what period the membership of the class is to be ascertained, are fully explained elsewhere. See *ante*, §§ 554, 555. The rules regulating vesting, which are stated in the text, are mainly invoked where the testamentary gift is to individuals, where the class doctrine is not in question at all.

⁴ *Boraston's Case*, 8 Co. Rep. 16, 19.

majority is to receive the income thereof while it is in trust during his minority, this circumstance is not indispensable. The same rule of vesting would apply where the income is to be applied in the interim to another purpose, though the presumption is more strongly in favor of the rule of vesting where the legatee himself is to receive the income.

Where a fund is given to one person to be enjoyed until another shall attain his majority, when it is to go to the latter, or to be paid if or when the other shall attain majority, the gift on majority is usually an executory devise or a legacy which vests at the death of the testator,¹ though possession is postponed until the devisee is of age.

A devise or legacy given in absolute terms, but which is "payable," or which is directed "to be paid" or delivered, to the beneficiary when he shall attain the age of twenty-one, vests absolutely at the death of the testator. The mere postponement of the payment, being usually for the benefit of the estate, and not by reason of considerations which are personal to the beneficiary, does not prevent the vesting.² The inclina-

¹ Collier's Will, 40 Mo. 287; Hathaway v. Leary, 2 Jones' Eq. (N. C.) 264; Lane v. Goudge, 9 Ves. 225; Webster v. Parr, 26 Beav. 236; Pearman v. Pearman, 33 Beav. 394. See also cases cited in next note.

² Cox v. McKinney, 32 Ala. 461; Watkins v. Quarles, 23 Ark. 179; In re Rogers, 95 Cal. 526, 530, 29 Pac. R. 962; Nelson v. Pomeroy, 64 Conn. 257; Bowman v. Long, 23 Ga. 247; Kelly v. Gonce, 49 Ill. App. 82; Allen v. Van Meter, 1 Met. (Ky.) 264; Danforth v. Talbot, 7 B. Mon. (Ky.) 623; Kimball v. Crocker, 53 Me. 263; Wardwell v. Hall, 37 N. E. R. 196, 161 Mass. 396, 399; Furness v. Fox, 1 Cush. (Mass.) 134, 136; Eldridge v. Eldridge, 9 Cush. (Mass.) 516, 519; Claffin v. Claffin, 149 Mass. 19, 22; Sears v. Putnam, 102 Mass. 5; Fuller v. Winthrop, 3 Allen (Mass.), 51, 60; Toms v. Williams, 41 Mich. 552; Hogan v. Hogan, 103 Mass. 641, 61 N. W. R. 73; Brown v. Brown, 44 N. H. 281; Benton v. Benton, 66 N. H. 169, 20 Atl. R. 365;

Dawson v. Schaeffer, 52 N. J. Eq. 341, 30 Atl. R. 91; Drake v. Bell, 3 Edw. (N. Y.) 251; Converse v. Kellogg, 7 Barb. (N. Y.) 590; Marsh v. Wheeler, 2 Edw. Ch. (N. Y.) 163; Sweet v. Chase, 2 N. Y. 73, 79; Roome v. Phillips, 24 N. Y. 465; Stevenson v. Leslie, 70 N. Y. 512; In re Murphy, 144 N. Y. 557, 39 N. E. R. 691; Birdsall v. Hewlett, 1 Paige (N. Y.), 32; Van Camp v. Fowler, 13 N. Y. S. 1, 59 Hun, 311; Harris v. Fly, 7 Paige (N. Y.), 421; Hoxie v. Hoxie, 7 Paige (N. Y.), 187; In re Crossman, 1 N. Y. S. 103; Aldrich v. Green, 48 Hun, 619, 1 N. Y. S. 549; Patterson v. Ellis, 11 Wend. (N. Y.) 259; Goebel v. Wolf, 113 N. Y. 405; Braunsdorf v. Braunsdorf, 23 N. Y. S. 72; Nunney v. Carter, 5 Jones' Eq. (N. C.) 370; Hathaway v. Leary, 2 Jones' Eq. (N. C.) 264; In re Jeremy's Estate, 178 Pa. St. 477, 35 Atl. R. 847; Scott v. Price, 2 S. & R. (Pa.) 59; Reed's Appeal, 118 Pa. St. 215; Bayard v. Atkins, 10 Pa. St. 17, 18; Schnure's Appeal, 70 Pa. St. 400;

tion of the courts is to favor vested legacies whenever this can be done consistently with the expressed intention of the testator.¹ So, too, in the same manner and with a similar effect, are to be construed words directing payment, division or distribution at a future date, coupled with a positive gift of a legacy which by its terms is not contingent.² Accordingly, where a legacy is payable to legatees, to whom it has been given by proper language, "when each shall attain the age of twenty-one," or as "they severally become of age," or "when they marry," or "after the death of A.," or on their "arrival at their respective birthdays," or where legacies are given to be paid after the debts of the testator have all been paid,³ or as soon as the assets of his estate have been converted into ready money, or when an outstanding mortgage shall have been collected, or when land devised for the payment of legacies shall have been sold, or the legacy is payable at any other future date, the legacy is vested, and the postponement of the payment does not alone make it contingent. In such cases, the postponement being for the benefit of the estate, if the legatee dies before the date of payment has arrived, the legacy must be paid to his personal representatives.⁴ Where the testator has placed a fund in trust for the purpose of applying both the principal and the interest or income to the support of his child during that child's minority, with a direction that all not spent for the child's support shall, on her attaining her majority, be paid to her, but if the child shall die under twenty-one then over, the court held, after supplying the words "without issue," that the child took a vested estate which went to her issue,

Buckley v. Read, 15 Pa. St. 83; *Bowman's Appeal*, 84 Pa. St. 19; *Young v. Stoner*, 37 Pa. St. 105; *Pond v. Allen*, 2 Atl. R. 802, 15 R. L. 171; *Baker v. McLeod*, 48 N. W. R. 657, 79 Wis. 584; *McReynolds v. Graham*, 43 S. W. R. 138 (Tenn., 1897).

¹ Thus, a devise as follows: "I give to D. the residue, a sufficient amount to be used to educate him before he becomes of age, but if he do not live to heir it then to a charity," creates a vested legacy. *Kimble v. White*, 50 N. J. Eq. 88, 24 Atl. R. 400.

² See § 866.

³ *Small v. Wing*, 5 B. P. Toml. 66.

⁴ In *re Murphy*, 144 N. Y. 557, 39 N. E. R. 691, and cases cited in note 2, page 1316. In *Sidney v. Vaughan*, 3 B. P. C. Toml. 254, a legacy was to be paid six months after the legatee should have completed his apprenticeship. The legatee absconded from his master before the end of his apprenticeship and never completed it. But upon his death his representative took.

when she died leaving issue, though she died before reaching the age of twenty-one.¹ Inasmuch as the position of the words of a will is immaterial in construing it to find out the intention of the testator, it does not matter at all, in determining whether a legacy or a devise is contingent, that the words directing distribution, division or payment precede or follow the words of gift by which the vested interest is transferred.

§ 870. **Contingent legacies which vest only at the majority of a legatee.**—Not every legacy which is made payable at the majority of the legatee vests in him at the death of the testator. If it shall appear that the testator intends that the attainment of majority by the legatee shall be a condition precedent, not only to the *payment* of the legacy, but to its *vesting* as well, the legacy will be contingent upon the legatee attaining his majority.² A legacy to be paid “when the legatee *comes of age*,” or when he “*arrives* at the age of twenty-one years,” or a legacy which is payable simply “*at majority*,” or “*if*” or “*in case* the legatee reaches majority,” may or may not be contingent according to the context read in connection with the circumstances. The inclination of the courts is to construe legacies of this sort, where words importing contingency are employed, and the *only gift is the direction to pay*, as legacies contingent upon the attainment of majority by the legatee, unless there is somewhere in the will clear language of gift creating a vested legacy. But if property is first given to A. absolutely, and it is to be delivered to him *when* he attains majority or *at majority*, the interest of A. will be conclusively presumed to vest at the death of the testator, and the reference to majority will be restricted to the vesting of the property in possession and enjoyment, either in him or in his representatives. The presumption that a legacy is vested is materially strengthened if the testator has directed the income to be laid out for the benefit of the legatee during his minority.³

But where no express language indicating the giving of an immediate present gift is used, and the only directions of the will are that a legacy shall be paid A., or he is to receive money or other property at majority, or *when* or *if* he shall

¹ *Baker v. McLeod*, 79 Wis. 534, 541.

² *Ante*, § 508.

³ See § 872.

attain majority, and particularly if the property is undisposed of during his minority, the legacy to A., is contingent upon A.'s attaining his majority. And if it is clear that the attainment of a given age by a legatee is a condition precedent to the vesting of the legacy, it will be contingent, though, besides the direction to pay, there shall be the express language of gift.¹

The question of the determination of the character of a devise or a legacy, whether it is or is not to be taken as vested or contingent, must be decided upon the context of the will, which is to be taken in connection with the disposition of the property made during the minority of the legatee to whom it is ultimately to go. A disposition of property "*to be kept together*" by the executor until the daughter of the testator shall arrive at her majority, "and when she becomes of age or marries *she is to have it*;"² or a devise under which A. is to receive a legacy "*when he arrives* at the age of twenty-one;"³ or legacies which are given to several "*if they shall live to come of age*;"⁴ or a legacy to a person *when he shall become of age* or marry, or at the death of another;⁵ or a direction to pay a sum of money to A. at the death of B., "*if A. shall have arrived at the age of twenty-eight years*,"⁶ is contingent and does not vest at the death of the testator.⁷ Where the attain-

¹ Knight v. Cameron, 14 Ves. 389; Lister v. Bradley, 1 Hare, 10; Heath v. Perry, 3 Atk. 101.

² Collier v. Slaughter, 20 Ala. 263; Allen v. Whittaker, 34 Ga. 6.

³ Moore v. Smith, 9 Watts (Pa.), 403; Giles v. Franks, 2 Dev. Eq. (N. C.) 521.

⁴ Jackson v. Winne, 7 Wend. (N. Y.) 47.

⁵ Snow v. Snow, 49 Me. 159.

⁶ Crossman v. Crossman, 6 Dem. Sur. 148.

⁷ See further, in reference to legacies contingent until majority and as sustaining the rule of the text, Travis v. Morrison, 28 Ala. 494; Scott v. Logan, 23 Ark. 351; Colt v. Hubbard, 33 Conn. 281; Eager v. Whitney, 163 Mass. 463, 40 N. E. R. 1046; Leeds v. Wakefield, 10 Gray (Mass.),

514; Collier's Will, 40 Mo. 287; Johnson v. Valentine, 4 Sandf. (N. Y.) 36, 37; Butler v. Butler, 3 Barb. Ch. (N. Y.) 304; Tayloe v. Gould, 10 Barb. (N. Y.) 388; In re Seaman, 147 N. Y. 69; Hathaway v. Leary, 2 Jones' Eq. (N. C.) 264; Sims v. Smith, 6 Jones' Eq. (N. C.) 347; Seibert's Appeal, 13 Pa. St. 501; Gilliland v. Burden, 63 Pa. St. 393; Moore v. Smith, 9 Watts (Pa.), 47; and also cases cited ante, § 508, note 2, page 668. It is elsewhere pointed out and explained that a contingent devise in remainder to children of a life tenant as a class, to vest in them *only as they attain majority*, vests in all the members of the class as they are born, and whether they become of age during the life-time of the parent or after his death. See ante,

ment of a particular age is a constituent part of the description of the members of the class who are to take a gift *inter se*, as where the gift is to *such children as shall attain majority*, or to *such children who may attain majority*, the gift is contingent until it shall be ascertained who will in fact attain majority, there being no gift *in futuro* except to those persons who compose the class as it is described.¹

In all the cases so far considered in this section where the legacies were construed to be contingent, the gift was based upon a condition precedent, expressed or implied, that the legatee should attain an age specified. It was necessary that a certain definite and fixed period of years should elapse before the gift could vest. Where there is a direction to pay at or after a *specified and definite period of years* has elapsed, and nothing more, the presumption that the legacy is vested is stronger than where the direction is to pay at the end of a period which may be longer or shorter in duration according to the event. Accordingly, though a legacy couched in positive words of gift, but to be paid *when the debts are paid*, or *when the estate is all in*, might be and it usually is a vested legacy, *a mere direction to pay or a direction to divide or distribute* among legatees as much as may be left after all debts are paid,² or to divide the proceeds of land which is devised to trustees for the sole purpose of a sale, may be a contingent legacy. So always, *a fortiori*, where the postponement of the distribution or payment is not until the expiration of a definitely fixed period, or of a period which is certain to come to an end sooner or later, though apt to be prolonged by the action of the trustees or executors, but when the payment of the legacy is to take place only upon the happening of an event, or on the concurrent happenings of several events, some or all

§ 347, page 466. *Cruse v. Barley*, 8 P. W. 20; *Stapleton v. Cheales*, 2 Vernon, 673; *Harvey v. Harvey*, 2 P. W. 21; *Onslow v. Smith*, 1 Eq. Cases Ab. 295, *Cloberry v. Lampen*, 2 Ch. Cas. 155; *Smell v. Dee*, 2 Salk. 415, are some of the early cases upon this question of the vesting of personal legacies.

¹ "When my youngest child at-

tains the age of twenty-one I desire my real estate to be divided among my children equally, their heirs and the survivor," gives the children contingent interests which depend upon their living until the youngest child attains full age. *McClain v. Capper* (Iowa, 1896), 67 N. W. R. 102.

² *Bernard v. Montague*, 1 Mer. 422.

of which may never happen at all, the legacy, whether given by direct language or merely by a direction to pay, is contingent.

§ 871. **The effect of a limitation over on death during minority as vesting a legacy.**—A legacy or devise payable or to be conveyed *if, when* or *in case* the legatee or devisee reaches his majority or some other age, or *if* or *when he or she marries*, by which language the gift is admitted to be contingent, may be rendered vested by a limitation over in case the legatee dies during his or her minority, or before his or her marriage. Thus, where land was devised to A. in fee simple, “if it should happen that he shall attain the age of twenty-one years” (which was clearly a contingent devise), but on his death before that age then over to others in fee, the gift was taken to vest in A. immediately at the death of the testator,¹ but defeasible by his death under majority either before or after the death of the testator.² The giving of the property to others upon the death of the legatee before the event happens is construed to indicate that the testator meant that the devise or legacy should vest at his death, and that it should be indefeasible upon the happening of the event. If the vesting of the title of the gift was only to take place if or in case the legatee reached his majority or married, that is, if the gift is contingent, there *would be no necessity for a limitation over on his death prior thereto, for the law would imply that*. The beneficiary takes a defeasible vested estate upon a condition subsequent, which is fulfilled, and the estate becomes indefeasibly vested on the happening of the event. This rule of construction is equally applicable to cases where, on the death of the legatee under age, the property is to go over to his issue,³ and where it is to go to some stranger. And it is also applicable to gifts to classes. And the fact that the fee of the estate is vested in trustees as well as the interim interest is not material to vary the construction.⁴ Thus, in the very common case of a gift to

¹ Edwards v. Hammond, 3 Lev. 132, 2 Show. 398, followed in Doe d. Hunt v. Moore, 14 East, 601; Doe d. Roake v. Nowell, 1 Maule & Sel. 327, 5 Dow, 202.

² § 342.

³ Dawson v. Schaefer, 52 N. J. Eq. 341.

⁴ Phipps v. Williams, 5 Sim. 44, 9 Cl. & F. 583. See also Nixon v. Roberts, 24 Ala. 636; Grigsby v. Breckinridge, 12 B. Mon. (Ky.) 632; Wallingford v. De Bell, 15 B. Mon. (Ky.) 531; Dale v. White, 83 Conn. 293; Young v. Stoner, 37 Pa. St. 105.

the children of a life tenant, to be paid to them as they shall attain the age of twenty-one, the remainder vests in them as soon as they are born, but it is defeasible as to any of them who shall die before he or she attains majority.¹ So, too, a gift to one by name in fee, payable at majority, with a gift over in case of his death without issue under majority, is vested if he survive the testator, and upon the death of the legatee during minority leaving issue, the issue will take the fee by descent from him.² The same principle, that the devisee shall take a vested estate though payment or enjoyment be postponed until majority, is applicable where any other event than death without issue is employed in connection with the death of the legatee during his minority.³

The presumption that a vested gift is intended which arises from the property being given to others upon the death of the first taker under majority may be rebutted by an express declaration that the testator does not mean the title to vest in the beneficiary unless he shall attain the age of twenty-one. Under the rule of construction which is based upon the effect and operation of a gift over in case of death under minority by which the gift is vested, there has arisen a distinction between a devise to an individual or a class "*if*" or "*when*" he or they attain twenty-one years of age, with a gift over in case of death

¹ See also § 366.

² *Baker v. McLeod*, 79 Wis. 534, 48 N. W. R. 657. See cases cited note 2, p. 504.

³ A direction that the widow of the testator shall have the use of the residue during life, and then to his son in fee, but if the widow and son should die before the latter attains the age of twenty-one then to A., gives the son a vested remainder in fee, which becomes indefeasible when the son reaches his majority. The gift to A. is an executory devise contingent upon A. surviving the widow, and the death of the son under his majority. *Shadden v. Hembree*, 17 Oreg. 14, 18 Pac. R. 572. A devise to children *nominatim* on condition that they should not have absolute control until the youngest child

should attain majority, and if any child should die leaving an heir, then such heir to take his parent's share, vests in the children at the death of the testator, and on the death of a child leaving a son before the youngest child reached majority, the grandson took. *Dawson v. Schaefer*, 30 Atl. R. 91, 52 N. J. Eq. 341; *Braunsdorf v. Braunsdorf*, 23 N. Y. S. 722. The testator gave to A. and directed that principal and accumulated income should be paid him if he were twenty-eight years of age at the death of a life tenant, but if A. died without issue under twenty-eight then over. The gift vested absolutely as soon as A. became twenty-eight, and was not divested on his subsequent death without issue. *Crossman's Estate*, 48 Hun, 617.

under majority, and a devise to "*such of a class as shall attain twenty-one*," with a similar gift over. The latter devise is contingent. No absolute gift is made. The gift is to persons or to a class who *attain full age*, and the attainment of full age is a part of the description of the legatees. A person who does not answer to the description has no right to the legacy. In other words, the attainment of majority is a condition precedent to the vesting of the legacy.¹ But where the gift is to A. *at majority*, with a devise over if he does not reach majority, the gift is vested. Majority is not used to describe the legatee, but merely and solely to show when he is to come in possession and enjoyment, and this too very appropriately at that age when the law permits him to alien and to incumber, and presumably by that time nature has endowed him with the faculty of caring for his property. And if a provision for several children as a class is contingent upon their surviving until the testator's youngest child attains the age of twenty-one years, and the testator then expressly provides for a disposition over upon the death of any child under twenty-one and without issue, a child who attains his majority, but who does not also survive until the testator's youngest child attains majority, does not take a vested estate, though the ordinary rule is that a devise over on the death of a beneficiary under majority without issue gives an absolute estate by implication on the attainment of that age.²

§ 872. **The effect of a gift of the intermediate income on the vesting of a legacy.**—A legacy which is payable in the future, as on the marriage or the majority of a legatee, and is contingent by the express terms of the will, may vest at the death of the testator by reason of a direction that the income of the fund is, in the meantime, to be employed for the benefit of the legatee to whom it is to be paid in the future. This rule will apply not only to a legacy which is to be paid to A. *if*, or *provided*, or *in case* he shall attain or *when* he shall attain the age of twenty-one, but also to a legacy which is to be

¹ *Festing v. Allen*, 12 Mee. & Wels. 279, 5 Hare, 573; *Bull v. Pritchard*, 5 Hare, 567.

² The class of cases considered in this section must be distinguished from those where income is given A.

during his majority, with a devise of the *corpus* to B. if A. shall die during minority, and no provision is made disposing of the *corpus* in case A. shall attain full age. These cases are treated fully, *ante*, § 467

paid to a legatee upon his or her marriage with consent, and which legacy is of course contingent upon the marriage being with consent.¹ The presumption that a legacy which is to be paid in the future is a vested legacy is very strong where the testator gives a legacy expressly and then directs his executor *to pay interest thereon eo nomine* to the legatee from his death, for interest is the payment of compensation for a forbearance in collecting the money upon which it is paid, and its payment implies the absolute ownership of the principal in the person who receives the interest.

But the inference that the testator intends to give a vested legacy, payable *in futuro*, is equally strong where he gives the interim income of the legacy to be laid out for the benefit of the ultimate legatee, provided he gives all of it for that purpose, with a direction that when the legatee attains majority or marries the *corpus* shall be paid to him. Thus, legacies which are to be paid to A., B. and C. *when* they shall respectively attain the age of twenty-one years or shall marry, with a direction that the interest of the securities which were thus bequeathed should be devoted to the support of the legatees until marriage or majority, vest at the death of the testator.²

A distinction has sometimes been made between the giving of the interest *eo nomine*, which accrues on a legacy before its payment, and a gift of income stated to be "for the purpose of support or education." If the income is for support, and the legatee dies in minority, his support ceases, and the legacy would seem to be contingent. Some authorities appear to place more dependence upon the circumstance that the executor is directed to pay accruing interest to the legatee as showing an intention to vest the legacy than upon a direction to apply income for the minor's support.³ But the distinction is not noticed by the American cases nor by those which have been

¹ Keily v. Monck, 3 Ridg. P. C. 205; Elton v. Elton, 3 Atk. 504.

² Hanson v. Graham, 6 Ves. 239; Lane v. Goudge, 9 Ves. 225; Hoath v. Hoath, 2 Bro. C. C. 8; Bird v. Maybury, 33 Beav. 351; Fonnereau v. Fonnereau, 3 Atk. 645; In re Peek's Trusts, L. R. 16 Eq. 221; Fuller v.

Winthrop, 3 Allen (Mass.), 51, 61; Ordway v. Dow, 55 N. H. 11; Tucker v. Bishop, 16 N. Y. 402; Patterson v. Ellis, 11 Wend. (N. Y.) 259; Kimball v. White, 50 N. J. Eq. 88, 24 Atl. R. 400, and cases in note 1, page 1325.

³ In re Ashmore's Trusts, L. R. 9 Eq. 99.

most carefully considered by the English courts.¹ In both cases the legacy is vested.

It has also been suggested that where the testator gives the income of a fund to the legatee until he reaches majority, and *then* directs that the principal is to be then paid him, and this direction is the first and only mention of the principal, the gift of the *corpus* is not vested, though the gift of the income is.² But the force of this rule of construction has also been denied,³ and, even if admitted, the rule should not be much extended, as the grouping of single words is never decisive of the testator's meaning. If the language of the gift of a future legacy is expressly contingent, the fact that the trustees are directed to apply only *a part of the interim income*,⁴ or that they have a discretion to employ such income, or as much of it as they may think proper, to the support of the legatee,⁵ or that they are directed to accumulate the income during minority, and, adding it to the *corpus*, pay them over together,⁶ will not render the future legacy vested. If, however, the trustees are imperatively directed to apply the whole income to the legatee's support, or if the whole interim income is given in express terms for his support, though the trustees have a *discretion to apply less than the whole*,⁷ the legacy is vested. A gift of the income may vest a future legacy which is given to a class as well as a future legacy given to an individual. But it must clearly appear that the gift of the income is to each member of the class separately, so that each member has a vested right to an independent share in the income during his minority, whether for his support or expressly as interest on a deferred payment of a legacy due. For where the interim income is merely given in trust generally for the support of the

¹ *Stevenson v. Lesley*, 70 N. Y. 512; *Van Wyck v. Bloodgood*, 1 Bradf. (N. Y.) Sur. 154; *Braunsdorf v. Braunsdorf*, 28 N. Y. Supp. 722; *Sawyer v. Cubby*, 146 N. Y. 192; *Dawson v. Schaefer*, 52 N. J. Eq. 341; *Provenchere's Appeal*, 67 Pa. St. 463; *Peter-son's Appeal*, 88 Pa. St. 397; *Roberts' Appeal*, 59 Pa. St. 70; *Valentine v. Borden*, 100 Mass. 273; *Baker v. McLeod*, 79 Wis. 534. And see also cases cited in note 2, page 668.

² *Batsford v. Kebbell*, 3 Ves. 363.

³ *Westwood v. Southey*, 2 Sim. (N. S.) 192.

⁴ *Pulsford v. Hunter*, 8 Bro. C. C. 416.

⁵ *Leake v. Robinson*, 2 Mer. 363, 383, 384.

⁶ *In re Grimshaw's Trust*, L. R. 11 Ch. Div. 406.

⁷ *Fox v. Fox*, L. R. 19 Eq. 286.

class as a whole, until they shall receive the legacy without any apportionment among them, it does not raise any presumption, in the absence of words of vesting, that the future legacy is vested.¹

No rule of law prevents the testator from giving a vested interest in income to A. until his majority, with a contingent legacy payable only *if* or *provided* he shall attain majority, provided this intention is evidenced by apt language. Thus, for example, if the testator expressly states money is to be divided among a class *when* they respectively reach their majority, *but if they die, in no case to go to their personal* representatives, with a direction to pay over income, which vests it, the gift of the *corpus*, being expressly contingent upon survivorship, continues so.² So, too, this would be the construction where the gift of the principal and of the income of a legacy is in fact but one inseparable and indivisible gift, as would be the case where the executor is directed to pay a specific sum *with interest* to A. *if* he shall reach majority,³ or to pay a fund or to deliver securities with *all income which may have accumulated* added to them if the legatee shall attain his majority.⁴ On the other hand, if the fund or the thing which is bequeathed is to be severed from the estate at the death of the testator for the advantage of the legatee, though it is to be paid or to be delivered to him only at his majority, and in the meantime the income is to accumulate and to go with the *corpus*, the latter is undoubtedly vested.⁵ A devise in trust for A., to be held by the trustee, who is directed to apply the income to A.'s support, with power to rent and repair the premises, vests an absolute fee simple in A., and not merely an interest in the income until he attains majority.⁶ A direction to apply income to a minor's support, with a gift of the *corpus* to him on his attainment of majority, "but if he die under majority" then over, means death during minority *without issue*. The minor takes a vested estate, and on his

¹ Lloyd v. Lloyd, 3 K. & J. 20; 240; Love v. L'Estrange, 5 B. P. C. Hunter's Trusts, L. R. 3 Eq. 298. Toml. 59; Oddie v. Brown, 4 De Gex

² In re Bulley's Estate, 11 Jur. (N. S.) 847. & J. 185, 194; Chance v. Chance, 16 Beav. 572.

³ Knight v. Knight, 2 S. & St. 490.

⁶ Deichman v. Arndt, 49 N. J. Eq. 106, 23 Atl. R. 799.

⁴ Stretch v. Watkins, 1 Mad. 253.

⁵ Saunders v. Vautier, Cr. & Ph.

death under majority, leaving a child, the child takes his share.¹ And a gift is not contingent merely because it may be taken in land or in money, as the beneficiary may elect. This occurs when land is devised in trust to apply the income to the support of minors during minority, with a power of sale in the trustee, and if not sold to partition among the beneficiaries when they reach a specified age. The power to elect to take either land or money is for the benefit of the legatee, and, the gift being vested, the failure of a beneficiary to elect because he dies in his minority does not divest it and his heirs may claim it.²

§ 873. **The vesting of pecuniary legacies, and particularly of those charged upon the rents or proceeds of land.**—The vesting of pecuniary legacies is, to a large extent, regulated by the same principles which control the vesting of lands devised, except so far as the law of legacies has been modified by being subject to certain principles of the Roman civil law, by reason of the early jurisdiction over legacies exercised by the English ecclesiastical courts concurrently with courts of equity. A money legacy given simply to a person who is *in esse* at the death of the testator, and without any express direction postponing the vesting, is a vested legacy *prima facie*. Thus, a direction to pay the sum of \$3,000 out of the estate if there should be anything remaining after the death of a life tenant;³ or a legacy “to J.” when he shall satisfy the executor that he is worth a sum specified;⁴ or to children at a future date in equal shares,⁵ is a vested legacy, and the words of postponement relate only to the payment and not to the vesting.

In the latter part of the seventeenth century the English court of chancery determined, as a positive principle of equity, that all legacies which are charged upon the rents or profits of land, or which are to be paid out of the proceeds of land which have been directed to be sold, whether the legacies were in terms vested or contingent, if their payment was postponed to a date after the death of the testator, would lapse in case of

¹ *Baker v. McLeod*, 79 Wis. 534, 48 N. W. R. 657. See also *ante*, § 867.

² *Fuller v. Winthrop*, 3 Allen (Mass.), 51, 63; *Curling v. May*, 3 Atk. 255.

³ *Chafee v. Maker*, 17 R. L. 739, 24 Atl. R. 773.

⁴ *Schwartz's Appeal*, 119 Pa. St. 337, 13 Atl. R. 212.

⁵ *Crosby v. Crosby*, 64 N. H. 77, 5 Atl. R. 907.

the death of the legatee before the arrival of the day of payment. This rule was adopted to favor the heir, who might take the land by descent, and was in direct opposition to the rule applicable to legacies payable out of personal property.¹ The modern rule is otherwise. If, from the language of the will, it is clear that the testator intended that the legacy which is charged upon the land should vest at his death, the postponement of the payment alone will not prevent the personal representative of a deceased legatee from receiving it in case the legatee dies before payment. No reason exists, either in law or in morals, why the presumption in favor of vested estates shall not apply to legacies which are payable in the future out of the rent of land as well as to those which are to be paid by the executor out of the personalty. So if the postponement of the payment of the legacy, which is a charge upon land, appears from the will to have been the result of a desire upon the part of the testator to make the payment of the legacy more convenient to the heir who takes the land, or to the devisee of the land, the presumption of vesting is strengthened, and if the legatee shall die before the date of payment arrives the legacy must be paid to his personal representatives.²

But the mere fact alone that the payment of a legacy, which is a charge upon the rents or proceeds of land, is postponed for the convenience of the estate, will not, where the legacy is expressly contingent upon the survival of the legatee, render it vested. An example of this would be a legacy to A., B. and C. as individuals, or the survivors or to a class or the survivors, to be paid by the sale of land after the widow shall have enjoyed the rents and profits during her life.³ Some of the English cases have laid down another distinction, which, though not recognized in America, deserves mention. These authorities hold that if the payment shall be postponed with

¹ *Duke of Chandos v. Talbot*, 2 P. W. 601, 610; *Poulet v. Poulet*, 1 Vern. 204; *Prowse v. Abingdon*, 1 Atk. 482. And see also cases cited *ante*, note 3, page 442.

² *Eldridge v. Eldridge*, 9 Cush. (63 Mass., 1851), 519; *Fuller v. Winthrop*, 8 Allen (Mass.), 51; *Collier's Will*, 40 Mo. 287; *Herbert v. Post*, 26 N. J.

Eq. 278; *Loder v. Hatfield*, 71 N. Y. 92, 99; *Marsh v. Wheeler*, 2 Edw. (N. Y.) 163; *Pond v. Allen*, 15 R. L. 171, 178, 2 Atl. R. 802; *Rogers v. Rogers*, 11 R. L. 38, 73-76; *Doe v. Considine* (78 U. S., 1867), 6 Wall. 458.

³ *Goodman v. Drury*, 21 L. J. Ch. 680.

reference to any circumstance which is personal to the legatee, as his attainment of majority, or his marriage, or his entering upon the practice of a profession, the legacy is not vested and lapses on his death prior to payment.¹ The fact that the testator has given the legacy over to another upon the death of the legatee before payment raises a very strong and almost a conclusive presumption that it is a vested legacy, and that it is not to be absorbed into the land for the benefit of the devisee.

§ 874. The definition and classification of executory devises.—An executory devise is a limitation in a will of a future contingent interest or estate in land, the character of which is inconsistent with the rules of the common law regulating future estates, and consequently which cannot take effect as a contingent remainder.² A devise of a future estate in land which can take effect as a contingent remainder at common law, *i. e.*, where the devise does not depart from the rules of law governing the limitation of contingent remainders, is a contingent remainder and not an executory devise.³

Executory devises have been subdivided into two classes. The first class includes those by which the testator first devises the fee of an estate, but provides that, upon the happening of some contingent event, this devise of the fee shall be abridged or defeated, and that the fee on that contingency shall vest in another. The latter estate is an executory devise.⁴ This class of executory devises is very numerous. It includes all limitations of estates coming after the definite failure of the issue of a devisee to whom the fee is given, with a proviso that it is then to go to another person, or to a class of persons, on his death without issue, simply, or under majority.⁵ Under such

¹ *Gawler v. Sanderwicke*, 1 Bro. C. C. 105, n., 2 Cox, 15; *Harrison v. Naylor*, 3 Bro. C. C. 108, 2 Cox, Ch. R. 247; *Phipps v. Lord Mulgrave*, 3 Ves. 613.

² 4 Kent, Com., p. 258; 1 Jarman on Wills, p. 864. And see also *post*, § 882.

³ *Carwardine v. Carwardine*, 1 Eden, 27; *Purefoy v. Rogers*, 2 Lev. 39; *Reeve v. Long*, Carthew, 310; *Goodright v. Cornish*, 4 Mod. 458. "Where a contingency was limited

to depend on an estate of freehold, which was capable of supporting a remainder, it should never be construed an executory devise, but a contingent remainder." By Lord Kenyon, in *Doe v. Morgan*, 3 T. R. 763.

⁴ For an explanation of the origin of executory devises and the relation of the rule of perpetuities to them, see *post*, § 882.

⁵ See cases cited *ante*, §§ 846–851.

circumstances the executory devise takes effect in substitution for and in derogation of the preceding limitation in fee and defeats it, thus differing wholly from a common-law contingent remainder, though, like a remainder, the executory devise is preceded by a freehold. In all these cases the executory devise of the fee vests absolutely upon the happening of an event which terminates prematurely the interest which preceded it. For this reason, as elsewhere explained, the ulterior limitation cannot be a valid remainder, for no limitation is valid as a remainder which, by its terms, vests upon the happening of any event which abridges, destroys or defeats the prior estate.¹

The second class of executory devises includes those in which the *fee is not disposed of* immediately at the death of the testator, but the disposition which is made of the fee must of necessity vest in the future, if it is to vest at all. The vesting of the executory devise may be postponed either because the objects of it cannot come in existence until a future and uncertain date, as, for example, a devise to the children of a person who is unmarried at the death of the testator, or who, if married, has then no children. In such a case the fee vests in the heirs of the testator, or in his residuary devisee, subject to be defeated by the birth of children to the person, who will take as a class an executory devise. Other examples of executory devises of the second class are future devises of the fee to the heirs of the body of A., who is alive at the death of the testator, but to whom a life estate is not given,² and a devise to a person to be delivered to him when he shall marry or attain the age of twenty-one years, or to vest in him at a specified date after the death of the testator.

§ 875. Executory devises not affected by the acts of the holder of the precedent estate.— We have elsewhere fully explained that it was the rule at the common law that if the particular estate which preceded a contingent remainder came to an end before the contingent remainder became vested, the latter was destroyed.³ Hence, if the life tenant should by act of his forfeit the estate *before* the contingent remainder became

¹ See *ante*, §§ 854–857.

² *Snowe v. Cutler*, 1 Lev. 135; *Doe v. Carleton*, 1 Wils. 225; *Harris v. Barnes*, 4 Burr. 2157.

³ See § 854. This rule has been repealed in England and in some states of the American Union. The English statute is 8 and 9 Vict., ch. 106, § 8.

vested, or if at the death of the testator the life tenant was dead or was incompetent to take the estate, the contingent remainder would never take effect at all, for it must either vest during the continuance of the life estate or immediately at its termination.¹ The rule applicable to executory devises is the direct opposite of this. No act of the tenant of the preceding estate can possibly affect the validity of the executory devise.² Thus, for example, where the fee is given in the first instance to A., but *if he shall die without issue living at his death*, then to the children of B. living at A.'s death, no action on the part of A. can defeat the devise to the children of B., which vested in the latter who are alive at the death of A.³ On the other hand, if the first devise is to *A. and his heirs absolutely*, an ulterior devise of what A. may not use on his death simply, not coupled with any other contingency, as death under age or without issue, is void, and A. may transfer the fee. The limitation to the children of B. is not a valid executory devise, but an ineffectual attempt to create a devise of a fee after it has been given to A. in express terms.⁴ And a devise to the children of A. after the death of B., in case he shall die intestate and without issue, is not a valid executory devise, as the limitation over may be defeated by B.'s power of disposing of it by will.⁵

§ 876. **The effect of the failure of an executory devise.**—Under circumstances where a conditional or determinable fee⁶ is devised to A., and this is followed by an executory devise of the fee in the nature of a conditional limitation to a person, or to a class of persons who are not in existence and who never come into being, so that the executory devise does not take effect, the question arises whether the determinable or conditional fee becomes absolute, or whether the fee is cut down and the testator is to be deemed intestate as to that part of his estate. An example of such a disposition would be a devise to A. and his heirs, but if at A.'s death there should be any living children of B. then to them in fee, and it happens that B. dies in the life-time of A. *leaving no children*. The presumption then is that A., the first devisee, is to take an absolute fee simple

¹ See *post*, § 881.

² *Pells v. Brown*, Cro. Jac. 590.

³ See *ante*, § 845.

⁴ See *ante*, § 689.

⁵ *Fisher v. Wester*, 25 Atl. R. 1009, 154 Pa. St. 65.

⁶ See § 845.

as there are no children of B. to take the fee. The testator evidently meant that *either* A. should have the fee simple absolutely, *or* B.'s children should have it, but no one else. He meant to give it away from the heir. It would therefore be contrary to his intention, in case the executory devisees cannot take, to deprive A. of it and permit the testator to die intestate, where he has expressly provided that A. is to take it unless B.'s children survive A.

On the other hand, where the event which is to defeat the primary devise of the fee is not the birth and survival of a class of executory devisees, but some event personal to the devisee himself, as his death unmarried, or in the life of another, or his death without leaving issue, the fee is defeated although, for any reason, the executory devisees cannot take. These qualifications annexed to the fee are *quasi*-conditions subsequent, and if they are not performed the fee conditional is defeated, though, on account of the non-existence or the incapacity of the executory devisees, the testator may prove to be intestate as to the fee. The distinction between the two classes of cases seems to be that in the latter class the non-occurrence of the contingent event is intended to defeat the precedent fee in any case, whether the executory devise following it shall ever vest or not. But in the former class it is the giving over of the fee to another which defeats the prior devise of the fee, and if *that fails to go into effect* the testator intends it to remain with him to whom he has first given it.¹

So, also, where the testator bequeaths a legacy in language which gives an absolute interest in the legatee, with a limitation over to another legatee upon a specified contingency, and the contingency does not happen, the legacy is absolutely vested.² Thus, where money is given absolutely to A., and upon his death *leaving children then to such children*, or what remains to such children, and A. leaves no children, his interest goes to his heirs and not to the heirs of the testator or to the executor, or A. may devise it.³

¹ See on this point *Doe d. Blomfield v. Eyre*, 5 C. B. 713.

² *Erickson v. Garden*, 5 Del. Ch. 323; *Taylor v. Langford*, 3 Ves. 119.

³ Where a legacy was given to A. for life, and the remainder to A.'s daughter, but if the latter should die unmarried and without children, then to B., and B. died before the testator, and A.'s daughter died with-

§ 877. **The transfer of future vested estates.**— By the early common law a vested remainder would pass only by grant without livery of seizin.¹ In more recent times a vested remainder may be transferred by the employment of a deed of bargain and sale, or of some similar conveyance which is operative under the statute of uses or under a similar local statute. A devisee of a future vested interest may incumber it in any way during the particular estate. If it is personal property he may give a chattel mortgage upon it.² And the interest of the remainderman will be subject to levy and sale under execution during the particular estate.³ A vested remainder or any vested future interest in land which consists of the fee, on the death of the remainderman or devisee during the life of the particular tenant descends to his heirs; and upon the death of the particular tenant the heirs will enter in possession, provided the remainder is not defeasible by the death of the remainderman before the termination of the particular estate.⁴ So, too, a legacy which vests at the death of the testator, though its payment has been postponed, should be paid to the personal representative of the legatee upon the death of the latter before actual payment takes place.⁵ Thus, where the testator has directed that legacies, which are given in language which creates vested interests, shall be paid at the marriage or at the majority of the legatee,⁶

out ever having a child, the court held the legacy to the daughter of A. was absolute and went to her next of kin. *O'Mahoney v. Burdette*, L. R. 7 H. L. 388, 407.

¹The grant, it may be mentioned in passing, was a common-law conveyance, employed to convey incorporeal hereditaments which were not of a tangible nature, and which for that reason could not be conveyed by feoffment and livery of seizin, which were always employed in the case of lands, the possession of which was vested.

²*Swett v. Thompson*, 149 Mass. 302, 21 N. E. R. 382; *Dimmick v. Patterson*, 142 N. Y. 322, 37 N. E. R. 109; *Heilman v. Heilman*, 129 Ind. 59; 4 Kent, Com., p. 195.

³*Shipp v. Gibbs*, 75 Md. 205, 88 Ga. 184.

⁴*Garrison v. Hill*, 28 Atl. R. 1062, 79 Md. 5; *Van Axte v. Fisher*, 4 N. Y. S. 173, 51 Hun, 640, 117 N. Y. 401, 22 N. E. R. 943; *In re Tompkins' Estate*, 49 N. E. R. 135, 154 N. Y. 634; *In re Eckert's Estate*, 157 Pa. St. 585, 27 Atl. R. 781; *Tindall v. Miller*, 41 N. E. R. 535, 143 Ill. 337; *Nelson v. Russell*, 135 N. Y. 137, 31 N. E. R. 1008; *Thomae v. Thomae* (N. J.), 18 Atl. R. 355.

⁵*In re Murphy*, 144 N. Y. 557, 39 N. E. R. 691; *Hills v. Barnard*, 152 Mass. 67, 25 N. E. R. 96; *Garrison v. Hill*, 79 Md. 5, 28 Atl. R. 1062.

⁶§ 869.

or shall be paid after the death of the widow of the testator,¹ or at some other future period, and the legatee dies before the date of payment arrives, the payment should be made to his administrator if he has died intestate,² or to his executor in case he has made a will.³

§ 878. **The acceleration of future estates.**—The rule was formulated in an early case in England that if land shall be devised to A. for his life, remainder to B. in fee simple, and A., though he is living, is a monk at the death of the testator, the life estate to him is void because he is *civiliter mortuus* by reason of his being a monk. Upon the death of the testator the remainder in fee will go at once to B.⁴ In other words, the enjoyment of the possession of the future estate will be accelerated when from any reason the preceding estate fails. The principle of the acceleration of future and expectant estates is well established.

So where there are two or more limitations by will, whether of real or of personal estate,⁵ to several persons absolutely, to be enjoyed by each of them successively in point of time, and one or more of the earlier gifts fail, either because of the death of a devisee, by reason of which a lapse occurs,⁶ or because of

¹ § 866.

² *Budd v. Haines*, 52 N. J. Eq. 488, 29 Atl. R. 170.

³ *Conant v. Bassett*, 52 N. J. Eq. 12, 28 Atl. R. 1047; *McCarty v. Fish*, 87 Mich. 48, 49 N. W. R. 513. See also *Smith v. West*, 103 Ill. 332; *Rhodes v. Shaw* (N. J.), 11 Atl. R. 116. A remainder in the children of B. as a class *and their heirs*, coming after a life estate in their parent, is a vested remainder, which is devisable and assignable during the life of the parent, though possession has been postponed until after several life estates. *Loring v. Carnes*, 148 Mass. 223, 19 N. E. R. 343. See also *Chapman v. Chapman*, 90 Va. 409, 18 S. E. R. 913.

⁴ *Perkins*, 567; *Shep. Touch.* 435, 451; 2 Black. Com., p. 122. The rule of the acceleration of remainders is applicable, under the principles of the

common law, exclusively to vested remainders. If the particular estate upon which a contingent remainder is expectant comes to an end before the contingent remainder becomes a vested remainder, the latter is forever gone; for, at common law, no freehold estate can be limited by livery of seizin to begin *in futuro*, and every contingent remainder must have a vested particular estate to support it. Of course, these rules do not apply to executory devises or future trust estates.

⁵ *Lainson v. Lainson*, 23 L. J. Ch. 170; *Jull v. Jacobs*, L. R. 3 Ch. Div. 703; *In re Lowman*, (1895) 2 Ch. 348, 12 Reports, 362.

⁶ *Robinson v. Female Orphan Asylum*, 8 S. Ct. 327, 123 U. S. 702; *Simpson v. Cherry*, 34 S. C. 1, 68, 12 S. E. R. 886.

the incapacity of a life tenant to take,¹ or because the prior devisee refuses to accept the benefit,² or where the prior gift is void because it is clearly in contravention of some recognized rule or principle of law, common or statute, as, for example, where it is in violation of the rule of perpetuities,³ or because the prior interest given has been revoked by the testator,⁴ the next estate following will be accelerated, and it will vest *in possession at once*, but it will not be otherwise affected. And if one or more of those who would have taken the earlier estates shall die in the life-time of the testator, the next in order will take *absolutely*, though he might never have taken anything in the event of the prior devisees having survived the testator.⁵

Where land is devised in trust, whether to executors or trustees, until A. attain majority, to apply the rents and income which may accrue until then to particular purposes designated, with a devise of the land to A. when *he shall attain twenty-one years of age*, and a devise over to B. if A. shall die under his majority, and A. happens to die before he has attained his majority, the question is, does A.'s death accelerate the devise over to B., or do the trustees continue to hold and to accumulate income for the purposes of the will until the date when A. would have become of the age of twenty-one years had he survived? If the income is to be paid to A. during *his* minority, the principal to vest in him *when* he becomes twenty-one, the gift over to B. will of course take effect at once on the death of A.

But on the other hand, where the purpose of the accumulation of income from the trust was the payment of debts and legacies to other persons when the legatee, A., should have attained his majority, it will be conclusively presumed that there is to be no acceleration of the gift over to B. The primary intention of the testator is that this income is to be devoted to pay debts and legacies, and having estimated (whether cor-

¹ Jull v. Jacobs, L. R. 3 Ch. D. 703, where he was an attesting witness, and for that reason was incapable of taking under the will.

² In re White's Estate, 174 Pa. St. 672, 38 W. N. C. 136, 34 Atl. R. 321; Everett v. McCroskery, 92 Iowa, 333.

³ Hamlin v. Mansfield, 88 Me. 131,

139, 33 Atl. R. 788; Fosdick v. Fosdick, 6 Allen (Mass.), 41, 43.

⁴ Lainson v. Lainson, 18 Beav. 1, 5 De Gex, Mac. & G. 754.

⁵ In re Lowman, (1895) 2 Ch. 348, 12 Reports, 362; Craven v. Brady, L. R. 4 Eq. 209, 4 Ch. App. 296.

rectly or not it is immaterial) that the income which may arise during the minority of A. would be sufficient, and having thus made the income a primary fund for the purpose, it must remain so irrespective of other events. To permit an acceleration so that income shall go to B., or to recognize a resulting trust for the next of kin of the testator, will be contrary to the clear intention of the testator.¹

¹ *Boraston's Case*, 3 Co. 19a, 21a; *Lomax v. Holmedon*, 3 P. W. 176. his majority, with a gift of the income during his minority to pay debts or legacies to other persons. And the rule is applied to the case of a devise to A. in fee simple, he to receive possession when he attains *Carter v. Church*, 1 Ch. Cas. 113.

CHAPTER XLIV.

THE LAW OF PERPETUITIES AND REMOTENESS OF VESTING.

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| <p>§ 879. The definition of a perpetuity.</p> <p>880. The law of perpetuities — General considerations.</p> <p>881. The rule of remoteness in the vesting of contingent remainders.</p> <p>882. The origin of executory devises and of the modern rule of perpetuity.</p> <p>883. The possibility of the happening of the future event.</p> <p>884. The validity of future limitations to unborn persons.</p> <p>885. The rule of remoteness of vesting and of perpetuities in relation to contingent gifts to grandchildren as a class.</p> <p>886. The invalidity of the suspension of the power of alienation for a period which is indefinite or which is not measured by lives.</p> <p>887. The period is to begin at the death of the testator.</p> <p>888. Vested estates are not within the rule of perpetuities.</p> <p>889. The effect of a power of sale to prevent the operation of the rule of perpetuities.</p> <p>890. The rule of perpetuities in relation to charitable gifts.</p> <p>891. Devises for charitable pur-</p> | <p>poses may offend the rule when made to non-existent corporations.</p> <p>§ 892. Devise over on the termination of a charity — When void for remoteness.</p> <p>893. The suspension of the power of alienation during minorities.</p> <p>894. The separation of gifts to classes — When not permitted.</p> <p>895. The circumstances under which class gifts may be separated.</p> <p>896. The effect of the invalidity of a devise on the next expectant limitation following it.</p> <p>897. The statutory regulations of the rule of perpetuity in the United States.</p> <p>898. The rule of perpetuities in Connecticut.</p> <p>899. Cases illustrating the New York rule of perpetuities.</p> <p>900. The statutory rule of perpetuities in Wisconsin.</p> <p>901. The suspension of alienation for the purpose of accumulating income.</p> <p>902. The validity of accumulations for charity.</p> |
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§ 879. The definition of a perpetuity.— It may be of some benefit to the reader for the author to observe at the outset of this chapter that it by no means purports to contain an exhaustive treatment of the legal rules and principles which condemn and forbid the creation of perpetuities in real and personal property. This vast and very intricate subject has been considered in the standard works of Mr. Lewis and Mr. Gray

with admirable system and method which it were presumptuous to emulate, and with an amplitude of learning which it is impossible to excel. But inasmuch as the authorities in existence which discuss this subject may not be within the reach of many who would use these volumes, and for the further reason that the subject of perpetuities is one that is constantly coming up in practice in connection with the testamentary disposition of property, a short and concise discussion of it is absolutely indispensable.

A perpetuity may be defined as a disposition of property, either real or personal, by which the fee or absolute interest is so limited that by reason thereof the vesting of the fee or absolute interest will be suspended, and will not take place for a longer period than during the lives of one or more persons who are alive when the disposition is made, or (if it is in a will, at the death of the testator) twenty-one years thereafter, and a fraction of another year in addition for the period of gestation in the case of a posthumous child.¹ Under this definition, which makes the answer to the question whether a limitation of property is a perpetuity turn altogether upon the *suspension of the vesting of the fee or absolute interest* in it, rather than upon the suspension of the power of alienation of the absolute interest, it is clear that the giving of an *absolute vested interest, coupled with a restriction upon the power to convey or incumber it*, cannot properly be called a perpetuity. It does not follow that a direction to the effect that a vested estate shall not be alienated or incumbered is invariably valid. It is elsewhere² explained at some length that a settlement by will of property under which a living person is given an

¹ By vesting is here meant the vesting of the title, not the vesting of the possession. Blackstone, in 2 Com., p. 174, thus defines a perpetuity: "The settlement of an instrument which will go in the succession prescribed without any power of alienation." The definitions of a perpetuity are exceedingly numerous. Nearly every case in which the question of the existence of a perpetuity has arisen, of necessity defines it; for to determine whether in any particular instance

a perpetuity exists, we must know what it is, and for this we must resort to a definition. See *Ould v. Hospital*, 95 U. S. 312; *Perin v. Carey*, 24 How. (U. S., 1862), 494; *McArthur v. Scott*, 113 U. S. 382; *Bruce v. Nickerson*, 141 Mass. 403; *Jones v. Habersham*, 107 U. S. 185 (1882); *De Wolf v. Lawson*, 61 Wis. 469, 474 (1884); *Waldo v. Cummings*, 45 Ill. 421; *Phillips v. Harrower*, 93 U. S. 92, 106.

² *Ante*, §§ 522-525.

absolute vested estate in fee, but in which the testator has inserted language by which the devisee is restricted in or prevented from selling it or incumbering it, may be void because of the restriction of the power of alienation is repugnant to the giving of a vested estate in fee simple. Where this view is held it is not material that the restriction on the alienation is to endure only during the life of the devisee, where his interest is given absolutely, whether for life or in fee. The fee is vested in a living person, and on his death will descend to his heirs. While in the case of a true perpetuity the fee is limited contingently, *usually to persons not in being, and as soon as it vests there is no longer a perpetuity*. The effect in both cases may be and often is identical. The active commerce in land may be as effectually restrained in one way as in the other. But the distinction between these cases is very clear. It is also of some practical importance; for, if it be granted that the sole test of the creation of a perpetuity is the indefinite suspension of the power of alienation, or its suspension for an illegal period, it follows that under modern rules having their origin in courts of equity, by which future and executory contingent interests are assignable, no perpetuity exists or can exist in the case of an executory devise which is dependent upon a contingent event other than the coming into being of unborn devisees.

§ 880. The law of perpetuities — General considerations. The subject of the creation of invalid limitations of property, designated as perpetuities, by which the exercise of the power of alienating the absolute title and interest in property is temporarily destroyed or suspended, is one that, though constantly occurring, is but little understood except by those persons who have made a special study of it. The subject is generally regarded as unattractive, not only because of the inherent difficulty of the subject itself, but also on account of the somewhat abstruse and incomplete manner in which it has been treated by some of the text-writers.

The necessity for the imposition of some arbitrary restriction upon the power of suspending indefinitely the power of alienating the fee in real property, or the absolute interest in personal property, needs no argument. A social condition in which it would be legally possible to prevent for an indefinite

time the free and active conveyance of property would be lamentable and intolerable. All progress — social, commercial and intellectual — would be retarded, if not completely terminated at once. For it is only when men enjoy the full and unlimited power of readily transferring their property, and of changing the form in which it exists, that new business enterprises are initiated and those already in existence are carried to a successful conclusion. And though in the abstract the action of a testator or a donor in imposing such restrictions upon the future disposition of his property by those to whom it is given as will prevent its sale and the wasting of the proceeds may be commendable, still the injury caused to society at large and to public interests by his action may be so great as to outweigh any advantage which may be derived from the preservation of the property intact in the hands of individuals.¹

§ 881. **The rule of remoteness in the vesting of contingent remainders.**—An estate in fee, when it is limited to any person by deed as a common-law remainder, must vest in him: *first*, either *at the time of the creation of the particular estate*; *second*, or during its existence; or *third*, *eo instante* on its termination.² This principle of the common law was based upon

¹ I cannot do better than to quote, in this connection, the forcible language of Mr. Jarman from his masterly work on Wills (ch. IX, sec. 11, p. 251, vol. 1): "That free and active circulation of property, which is one of the springs as well as the consequences of commerce, would be obstructed; the improvement of land checked; its acquisition rendered difficult: the capital of the country gradually withdrawn from trade; and the incentives to exertion in every branch of industry diminished. Indeed, such a state of things would be utterly inconsistent with national prosperity; and these restrictions which were intended by the donors to guard the objects of their bounty against the effects of their own improvidence, or originated in more exceptional motives, would be baneful to all. It was soon perceived,

therefore, that when increased facilities were given to the alienation of property, and modes of disposition unknown to the common law arose from the introduction of springing uses and executory devises, that no act of the owner of the preceding estate could defeat, it was necessary to confine the power of creating these interests within such limits as would be adequate to the exigencies of families, without transgressing the bounds prescribed by a sound public policy. This was effected, not by legislative interference, but by the courts of judicature, who, in this instance, appear to have trodden very closely on the line which divides the judicial from the legislative function."

² 4 Kent, Com., p. 241; Plowden, 25, 28; Co. Lit. 49, a, b; *ante*, § 854.

the necessity which existed under the feudal system that there should always be a tenant of the freehold who might be called upon to perform the services which were due the feudal landlord and who might also answer as a defendant in ejectment. If the particular estate terminated before the birth of the person in whom the remainder which was contingent vested, the latter was forever defeated. There could be no intervening estate or interest between the particular estate and the remainder, for if the former came to an end before the latter vested in title, the remainder was gone forever, because a freehold could not be created by a common-law conveyance to commence *in futuro*.¹

If the remainder in fee vests at the time of the creation of the particular estate it is a vested remainder,² and the rule of the remoteness of vesting of remainders has no application, for that rule applies only to contingent remainders. Hence, we must here consider the doctrine of remoteness as applied to contingent remainders alone. A contingent remainder in fee is one which becomes vested as to its title either upon a *dubious and uncertain event*, the happening of which is uncertain and may never happen at all, or which is limited to a *dubious and uncertain person or class of persons*. If the contingent remainder does not vest either during the particular estate or immediately at its termination, it is void for the reason above stated.

¹ "First," says Blackstone (2 Com., p. 178), "they" (contingent remainders) "may be limited to a dubious and uncertain person. As if A. be tenant for life, with remainder to B.'s eldest son (then unborn) in tail; this is a contingent remainder, for it is uncertain whether B. will have a son or not; but the instant that a son is born, the remainder is no longer contingent, but vested. Though if A. had died before the contingency happened, that is, before B.'s son was born, the remainder would have been absolutely gone, for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if A. was tenant for life, remainder to his own

eldest son in tail, and A. died without issue born, but leaving his wife *enseint*, or big with child, and after his death a posthumous son was born, this son could not take the land by virtue of this remainder; for the particular estate determined before there was any person *in esse* in whom the remainder could vest. But to remedy this hardship it is enacted by statute 10 and 11 Wm. III., c. 16, that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's life-time; that is, the remainder is allowed to vest in them while yet in their mother's womb."

² *Ante*, § 860.

In consequence of this principle the *contingency upon which the remainder is to vest must be a common possibility, or a near possibility*. The remainder must, when limited to a person not in being at the date of its creation, be limited to some one that by common possibility *may come into being during the particular estate or when it terminates*. If the contingent remainder be limited to a person or on an event too remote, it is void *ab initio*. Thus, if an estate be limited to A. for life, remainder to his heirs, the remainder is good, for all the remaindermen must come into being during A.'s life, which is the measure of the particular estate.¹ So if an estate be given to A. for life, remainder to the heirs of B. in fee, who is a living person, and B. dies before A., the remainder is good, for it vests in the life of A. during the particular estate. The only possibility is the death of B. in the life of A.² But a remainder to the heirs or to the children of B., if at the creation of the particular estate there *is no such person as B. in existence*, is void as too remote, or as founded upon "a possibility upon a possibility." For here there must two contingencies happen during the particular estate. First, there must be born a person named B.; and second, he must die during the particular estate. A common illustration of this rule would be a limitation to A. for life, remainder to *his* children for life, remainder in fee to their children. Of course all of A.'s children would be born to him during the particular estate, *i. e.*, his estate for life, or would be *en ventre sa mere* at the date of its termination. But that all of his *grandchildren* would also be born during the same period is extremely unlikely, for it is in the highest degree probable that A. may die suddenly, leaving very young children who are unmarried or leaving his wife *enseint*. This was the only rule at the early law, prior to the creation of executory devises and contingent uses, by which the suspension of the power of alienation was tested.

And another rule of the earlier law which was applicable to contingent remainders rendered unnecessary any other rule for the prevention of a perpetuity in their creation. For contingent remainders were always liable to be defeated by destroying or terminating the particular estate before the contingency

¹ *Ante*, § 857.

² Co. Litt., p. 378; 2 Black. Com., p. 170.

happened upon which they were to vest. Hence, where the life estate is followed by various remainders in fee, all of which are contingent, the life tenant may destroy all of them not only by his death before they vest, but also by an alienation by feoffment,¹ surrender or otherwise, unless there shall be appointed trustees for the purpose of preserving the contingent remainders.²

§ 882. **The origin of executory devises and of the modern rule of perpetuities.**—As soon as certain estates and interests in land which had been unknown according to common-law rules began to be recognized in courts of equity, the necessity arose for the creation of a new rule to guard against perpetuities. We have seen that, at common law, a contingent remainder in fee cannot be created to vest *in futuro* without a

¹ § 854.

² In *Cole v. Sewell*, 4 Drew. & War. 1, the court, by Lord St. Leonards, said: "As to the question of remoteness, at this time of day I was very much surprised to hear it pressed, because it is now perfectly settled that, where a limitation is to take effect as a remainder, remoteness is out of the question, for the given limitation is either a vested remainder, and then it matters not whether it ever vest in possession, because the previous estate may subsist for centuries or for all time; or it is a contingent remainder, and then by the rule of law, unless the event upon which the contingency depends happen so that the remainder may vest *eo instanti* the preceding limitation determines, it can never take effect at all. There was a great difficulty in the old law, because the rule as to perpetuity, which is a comparatively modern rule (I mean of recent introduction, when speaking of the laws of this country) was not known, so that while contingent remainders were the only species of executory estate then known, and uses and springing and shifting limitations were not invented, the law did speak

of remoteness and mere possibilities as an objection to a remainder, and endeavored to avoid remote possibilities; but since the establishment of the rule as to perpetuities, this has long ceased, and no question now ever arises with respect to remoteness; for if the limitation is to take effect as a springing, shifting or secondary use, not depending on an estate tail, and if it is so limited that it may go beyond a life or lives in being, and twenty-one years and a few months, equal to gestation, then it is absolutely void; but if, on the other hand, it is a remainder, it must take effect, if at all, upon the determination of the preceding estate. In the latter case, the event may or may not happen before or at the instant the preceding estate is determined, and the limitation will fail or not, according to the event. It may thus be prevented from taking effect, but it can never lead to remoteness. That objection, therefore, cannot be sustained against the validity of a contingent remainder. But this dictum of the court is not to be in any wise construed as declaring that contingent remainders are not subject to the rule against perpetuities."

particular freehold estate to support it,¹ and that the tenant of the particular estate may, if he choose, wholly defeat the contingent remainder before it vests at all.² So, too, a remainder in fee cannot at the common law be limited after a fee; as, for example, a gift of land to A. in fee simple, and if he die without issue then remainder in fee to B. After the passage of the statute of wills and the establishment of uses, many future and contingent estates in land, which would not be valid as common-law remainders, were recognized by the courts. They resolved, in every case where it was possible, to carry out the intention of the testator. If the testator had intended to create by will a common-law contingent remainder, and it appeared that the devise would fail as such because not consistent with legal rules, the courts supported the limitation by will under the name of an executory devise.³

An executory devise differs from a contingent remainder in several important particulars. In the first place an executory devise of a fee simple is valid though there be no particular estate to support it. A freehold may be created by an executory devise to commence in the future, which could not be done in the case of a common-law contingent remainder. If the prior estate terminates before the executory devise vests, the fee is not in abeyance, but devolves upon the heirs of the testator, subject to defeasance by the happening of the contingency upon which it is to vest in the executory devisee.

As soon as the validity of executory devises was firmly established and it became possible to carve out future interests of a contingent nature, through which, because the person who was to take the fee was not known, the power of conveying the fee-simple title was suspended for a more or less indefinite period, it also became necessary for the courts to fix some limit to the period of suspension in order that a perpetual suspension of the power of alienation might be avoided. Contingent remainders might be defeated by the alienation of the particular tenant, and estates tail were also barrable by common recoveries. But executory devises, unless they follow an estate tail, are wholly exempted from any control of the first taker of the fee.⁴ The executory devise cannot be destroyed by any action

¹ See *ante*, § 854.

² See *ante*, § 881.

³ See *ante*, § 874.

⁴ See *ante*, § 875.

on his part or any alteration in or destruction of the nature of his estate.¹

When the courts were called upon to determine the validity of the executory devises and shifting and springing uses which were constantly being created after it had been discovered that land could be devised to uses in ways not possible at common law,² it became necessary to determine the period within which the fee devised by an executory devise or by a future contingent use must vest. Every executory devise which is contingent is a perpetuity so far as it goes, because the fee is rendered absolutely inalienable during the period in which the future devisees are not ascertained or ascertainable, and the fee cannot be conveyed though all mankind should join in the conveyance. The courts, in formulating the rule, resorted to the old principle of remoteness, as that principle was exemplified and involved in the giving of a contingent remainder in fee to the unborn child of an unborn person. The practical effect of this rule of remoteness was that the contingent remainder was void if it did not vest in and during the life of a person in being, *i. e.*, the life of the tenant of the particular estate. This being so, the courts fixed upon a life or lives in being as the measure

¹ "The executory devise is wholly exempt from the power of the first devisee or taker. If, therefore, there be an absolute power of disposition given by will to the first taker, as if an estate be devised to A. in fee, and if he die possessed of the property, without lawful issue, the remainder over, or remainder over of the property which he, dying without heirs, should leave, or without selling or devising the same. In all such cases the remainder over is void as a remainder because of the preceding fee, and is void by way of executory devise because the limitation is inconsistent with the absolute estate or power of disposition expressly given or necessarily implied by the will. A valid executory devise cannot subsist after an absolute power of disposition in the first taker. When an executory devise is exe-

cuted in the first taker it is a species of entailed estate to the extent of the authorized period of limitation. It is a stable and unalienable interest, and the first taker has only the use of the land or chattel pending the contingency mentioned in the will. The executory devise cannot be divested even by a feoffment; but the stability of these executory limitations is nevertheless to be understood with this single qualification, that, if an executory devise or interest follows an estate tail, a common recovery, suffered by the tenant in tail before the condition occurred, will bar the estate depending on that condition, for a common recovery bars all subsequent and conditional limitations." 4 Kent, Com., pp. 264, 265.

² See *ante*, § 771 et seq.

of the time during which the power to alienate the fee could be allowed to continue in suspense.

At first the period was confined to one life in being, which was exactly the rule of remoteness of a remainder.¹ Afterwards it was held that the period should be measured, not by one life, but by the duration of the lives of persons who were *all in existence at the same time*; the court quaintly observing that it was enough if "the candles were all lighted together." In other words, the period of the suspension of the power of alienation, though measured by a hundred lives, could not possibly endure longer than the life of the longest liver of them.² It was not, however, until the year 1736 that the rule of perpetuities in its present form, *i. e.*, with the addition of the term of twenty-one years to the period of life or lives in being, was firmly established. In a case decided in the year mentioned, it was determined that an executory devise to such unborn son of a *feme covert* as should first attain the age of twenty-one was valid, for the utmost space of time that the fee would be suspended was the life of the mother and the subsequent infancy of the son. Later, a fraction of a year was added to the period to allow for the birth of a posthumous child to a life tenant, which brings the rule of perpetuities to the condition in which we now find it where it is not modified by statute.³

The addition of twenty-one years to the period of perpetuity is the addition of an absolute term which has no reference to the actual infancy of any person whatever. That is to say, the testator will be permitted to suspend the power of alienation for a life or lives in being, and for any fixed period of time in addition thereto not to exceed twenty-one years. He may suspend the alienation for ten years or twenty, or for any stated time less than twenty-one, and need not limit it in express terms for the infancy of any person born or unborn. But in the same case in which this point was decided, it was also determined that the period of gestation was not in every case

¹ *Pells v. Brown*, Cro. Jac. 590; *Snowe v. Cutler*, 1 Lev. 135. nite failure of issue was valid was decided in the affirmative. *Duke of Norfolk's Case*, 2 Ch. Cas. 1.

² *Goring v. Bickerstaffe*, Pollexfen, 31. To the same effect is *Scattergood v. Edge*, 1 Salk. 229. In the year 1685 the question whether an executory devise over upon a defi-
³ *Atkinson v. Hutchinson*, 3 P. W. 258; *Goodman v. Goodman*, 1 Blacks. R. 188; *Long v. Blackall*, 7 T. R. 100.

to be considered as forming, with the lives in being and the twenty-one years, a gross term, irrespective of the non-existence of an infant *en ventre sa mere*. The suspension cannot go beyond twenty-one years. A period of gestation is only to be allowed in those cases where it actually exists.¹

§ 883. **The possibility of the happening of the contingent event.**—The principle of law by which a fee simple given to commence in the future must vest, if it is to be valid at all, within a life or lives in being and a minority, is infringed if the vesting of the future estate be made to depend upon some contingent event which, while it *may* possibly happen within the lawful period, *may possibly not happen within that period*. The possibility of the event happening is the legal test of a perpetuity, not the fact that it actually will happen or that it has happened. The fee must of necessity vest and thus become capable of alienation within the period limited by the rule of law under consideration. *It must be certain at the time that the limitation is created* that it will so vest. For, though it may then be extremely probable that the fee will vest, still if there is a possibility that the vesting will be postponed beyond the period of the rule, either because of the character of the contingent gift itself, or because of an express direction contained in the will, the limitation will be void because it will be too remote. The primary limitation of the fee must be so framed that it shall of necessity, under any and all circumstances as they exist at the death of the testator, take effect as a vested estate within the period allowed by the law.² Thus, to illustrate, a limitation by means of which the vesting of the fee is indefinitely postponed until incumbrances upon property shall be paid off,³ or a devise of property absolutely in trust, with-

¹ Cadell v. Palmer, 7 Bligh, 202, 1 Cl. & Fin. 372, 10 Bing. 140, 1 Sim. 173.

² Sears v. Putnam, 102 Mass. 5, 7; Fosdick v. Fosdick, 6 Allen (Mass.), 41, 43; Merritt v. Bucknam, 77 Me. 253, 259; Brooks v. Belfast, 90 Me. 318, 323; Meek v. Briggs, 87 Iowa, 616, 619; Ford v. Ford, 70 Wis. 19, 61; Schettler v. Smith, 41 N. Y. 328; Thomas v. Gregg, 76 Md. 169, 24 Atl. R. 418;

Dana v. Murray, 122 N. Y. 604, 617; Haynes v. Sherman, 117 N. Y. 433, 437; Purdy v. Hayt, 92 N. Y. 446, 457; Jackson v. Phillips, 14 Allen (Mass.), 550, 572; Brattle Square Church v. Grant, 3 Gray (Mass.), 142; Odell v. Odell, 10 Allen (Mass.), 5, 7; Leake v. Robinson, 2 Mer. 363; Griffith v. Pownal, 13 Sim. 393.

³ Killam v. Allan, 52 Barb. (N. Y.) 605.

out a power of sale in the trustee, until a charitable corporation shall be incorporated to whose use the property shall be devoted, or a condition that a house or parcel of land shall be devoted to a particular purpose for an indefinite period, where the purpose is not a charitable one, with a limitation over upon the breach of the condition, or any other disposition of the property by which the vesting of the fee is indefinitely postponed, or by which it is postponed for a period which is not measured by a life or lives in being and twenty-one years thereafter, *is invalid though it may happen ultimately, by reason of unexpected circumstances, that the fee shall in fact vest within the period laid down by the law under the rule.*¹

So where property was given by the testator to his children for *their* lives and to their husbands for *their* lives, respectively, and, after the death of any child and her husband, then to the children of the marriage, the limitation to the grandchildren was held void because of the possibility that a child might, after the death of the testator, marry a man who was not in being at the death of the testator, and that this unborn person might be the survivor of the marriage.² So also a gift over of the share of a devisee, in case of his or her death without issue during the life of his or her wife or husband, is void for remoteness. The legatee may marry a person not in being at the date of the death of the testator, who may survive the legatee more than twenty-one years, and the gift over, because of this possibility, is therefore invalid.³ Under the same amplification of the general rule would also be included a gift to a person *un-*

¹ I cannot do better in this connection than to quote the very lucid explanation of this point made by Mr. Lewis, who says on page 478 of his work: "The rule requiring all future limitations to be such as, if they take effect at all, will necessarily operate within the period of lives in being and twenty-one years, obviously condemns as invalid every gift of a future interest in property made to depend on an event which, although it may possibly happen within the allowed period, may possibly not happen until after the expiration of such period. . . . Let the event con-

templated be what it may, and the probability of its early occurrence as great as it may be, it will in every case be of too remote expectancy, and a limitation upon it will therefore always be void unless either from the nature or internal quality of the contingency, or from express provisions and restrictions it be certain that the event which is to give effect to the limitation will happen, if it at all, within the period of lives in being and twenty-one years."

² Loring v. Blake, 98 Mass. 253.

³ Hodson v. Ball, 14 Sim. 558.

born at the death of the testator, whose description is particularly qualified, but who may not correspond to the description within the legal period. Such would be the case of a devise to the eldest son of A., who has no son at the death of the testator, to vest in him when he shall marry or enter upon the practice of a particular profession. The devise to such a person will be void, though he may by possibility come into being and qualify during the legal period. Thus, in the example given, A. may have a son born to him who may marry or otherwise qualify during the life of his father. But the possibility that he will not do so, however slight, renders the devise to him and the devise over void. This applies to all personal qualifications and to the performance of all conditions precedent or subsequent which are not necessarily fulfilled by an *unborn devisee before* he shall attain majority. Thus, where the testator gave lands in fee to the son of A. who should become a clergyman of the Church of England, but if no such son, then in fee to B., and A. died without ever having had a son, the devise was void for the reason that, according to ecclesiastical rules, no person can be ordained until he shall have attained his twenty-fourth year. The power of alienation might thus possibly be suspended during the life of A.; for, until all his children were born, it could not be told which would become a clergyman, and at least twenty-three years thereafter, though it is evident that if A. had a son born to him and A. lived long enough, that son *might* have acquired the proper qualification in the life-time of his father.¹ But a devise to A., *who is a living person* at the death of the testator, to vest when he shall marry, or upon the performance of another act upon his part, is valid; for the condition, if performed at all, must of necessity be performed during his life-time.

§ 884. **The validity of future limitations to unborn persons.**—The rule of perpetuity, and the ancient rule of remoteness which was applicable to contingent remainders, do not, it hardly seems necessary to say, prevent the giving of future interests for life, or in fee simple, to persons who are unborn at the death of the testator, provided that such unborn persons must necessarily be born within the period of the rule. The limitation of a contingent remainder in fee to unborn persons

¹Procter v. Bishop of Bath and Wells, 2 H. Bl. 358.

who may be the children or the heirs of a life tenant or of other persons is so common that the fact need only be mentioned to be accepted as a valid rule of testamentary law.¹ It is absurd to admit that a fee may be so limited and be valid, and at the same time to deny that a life estate may be thus given, for obviously the greater includes the less.

The only absolute requisite to the validity of a contingent remainder to unborn persons, either for life or in fee, is *that they shall be born during the particular estate*, and this is true whether they are the children or the heirs of the life tenant or of some other person. And under the modern rule of perpetuities, which regulates the vesting of executory devises and future equitable estates to which this rule is not applicable, estates may be limited by way of executory devises to unborn persons for their respective lives, or to several unborn persons in succession for life, and to their issue, to go from one to another on a definite failure of issue, if by the terms of the will all the unborn persons *must of necessity, and in order to take any interests at all*, be born during the life or lives of some one or more persons in being at the testator's death, no matter how many such persons there may be.²

At the common law a remainder could not be created without a particular estate of freehold which was in existence at its creation. If the particular estate were given to an unborn person, or to a person incapable of taking, and who could not receive livery of seizin, the remainder, whether vested or contingent, was gone forever, because at common law a freehold could not vest *in futuro*.³ But the remainder could not be said to be invalid for remoteness. Moreover, the courts of equity recognized a distinction where the future estate was attempted to be created by a will or by a feoffment to use, and upheld it though it was limited to begin after a life estate devised to a person unborn at the date of its creation.⁴ In the case of executory devises and future uses, which do not require the creation of particular estates to support them, the rule was quite different from the case of contingent remainders created

¹ See *ante*, §§ 558, 612, 617, 857.

² *Cadell v. Palmer*, 7 Bligh, 202, 10 Bing. 140.

³ 4 Kent, Com., p. 229.

⁴ 2 Rol. Abr., p. 415c; Plowd. 33a, 414a; Comyn's Digest, tit. Estate, B., 14.

by grant or feoffment. By an executory devise a life estate might be given to an unborn person and the remainder in fee might be limited over to other unborn persons, provided they were not the issue of the life tenants, and provided they would all be born within the life or lives of persons in being at the death of the testator and twenty-one years thereafter. The fee remains in the testator's heirs subject to vesting in the unborn persons when they shall come into being during the legal period.¹

§ 885. **The rule of remoteness of vesting and of perpetuities in relation to contingent gifts to grandchildren as a class.**—An executory contingent limitation of the fee to vest in the grandchildren of the testator as a class, after a life estate in their father, he being a child of the testator, as *it is a contingent remainder, is never void for remoteness*, as it must vest, if it vest at all, during the existence of the particular estate, or *eo instanti* that this estate comes to an end. It is obvious, as the parent is a child of the testator, that he must be *in esse* at the death of the testator, and it matters not, so far as the rule of remoteness is concerned, that he is *en ventre sa mere* at that date. And though *he* may be unborn when his father dies, all *his* children must of necessity be born during his life or within the period of gestation at its termination. Hence, the contingent remainder, though it be to grandchildren as a class, *some* of whom may not be born until after the death of the testator, is valid, as it must at the latest vest at the termination of the parent's estate. On the other hand, if the gift to the grandchildren of the testator be an executory devise after a fee, it is bound to vest within the limits of the modern rule of perpetuities, for all the devisees, *i. e.*, the testator's grandchildren, must come into being within the life time of their parent, or within a possible period of gestation thereafter.

And when the gift to the grandchildren of the testator is an executory devise, or a future contingent equitable interest, *though not where it is a contingent remainder at the common law*, a further postponement of the vesting of the fee until the grandchildren shall attain majority does not render it invalid. A devise in trust to pay the income of a fund to the daughters of

¹ Carney v. Kain, 40 W. Va. 758, 23 ton, 70 Md. 418, 17 Atl. R. 329. And S. E. R. 650; Pennington v. Penning- see also § 874.

the testator during their lives, and at their decease the trust fund to be divided among their children who are then living and the issue of any deceased child as they arrive at legal age, is valid. The grandchildren who survive the daughters, and the issue of deceased grandchildren who also survive the daughters, form a *composite class who take a vested interest*, the issue by substitution for their parents. All great-grandchildren who come into being before the death of the life tenants are capable of taking by substitution, but not those born subsequently, as that would be an executory gift to a class which is too remote.¹ A limitation in fee to the great-grandchildren of the testator, *unless they are to take by substitution a parent's share*, is necessarily void as a contingent remainder, because of the remoteness of the vesting, for it may not by possibility vest in the great-grandchildren during the existence of the particular estate or at its termination. It is a remainder limited to a class of persons (*i. e.*, the testator's great grandchildren) who are unborn at the date of its creation,² and for that reason alone it is void as a common-law remainder.³

It will generally be found, however, that executory limitations of a contingent character *to the grandchildren of A. as a class or another person than the testator*, A. being alive at the death of the testator, are void. An example of this would be a contingent remainder to the grandchildren of A. after life estates in their father and grandfather respectively. The limitation to A.'s children would certainly be valid, as it must of necessity vest in them during A.'s life or at once on his death. But A. may have children born to him *after* the death of the testator, who, in their turn, may subsequently and after the death of *their* parent have children born to them; and as these after-born grandchildren are, according to the terms of the class gift, to participate as members of the class in the contingent gift with those who may be born within the legal period, the whole gift to the grandchildren of A. is invalid. Thus, where the limitation was to A. for his life, remainder to A.'s children for their lives, remainder to A.'s grandchildren in fee, the latter

¹ In *re Siddall's Estate*, 180 Pa. St. 213; *Lockridge v. Mace*, 109 Mo. 162, 127, 36 Atl. R. 570. 169, 18 S. W. R. 1145; *Stout v. Stout*,

² See *ante*, § 881.

44 N. J. Eq. 479, 15 Atl. R. 843.

³ *Somerville v. Lethbridge*, 6 T. R.

remainder was held void for remoteness.¹ And in a case² where an estate was disposed of as follows: to A. for his life, remainder to A.'s eldest son for his life, remainder to E. for his life, and after the death of all the life tenants "then in fee to all the children of A. then living, and to the children of those who may then be dead, but if there be no child or grandchildren of A. then over," the devise to the grandchildren was held to be original and not substitutional, and therefore contingent and void. A. in this case left no children. So a devise in trust for the daughter of the testator for life, and on her death to her children until *they arrive at the age of twenty-five*, then to be divided among the then living grandchildren of the testator, is void, as, if there were children born to the daughter *after the death of the testator*, the trust might be extended beyond her life and twenty-one years thereafter.³ So where a future estate was to vest in the grandchildren of the testator in fee when they shall attain the age of twenty-one years, with a life estate in the parent, coupled with a power to appoint among her children by will, an appointment under this power to the children of the devisee for life is invalid; as, when read in connection with the will creating the power, the fee is suspended for a period which may possibly extend beyond the rule.⁴

§ 886. The invalidity of the suspension of the power of alienation for a period which is indefinite, or which is not measured by lives.—Both according to the common-law rule of perpetuities and under the statutory regulations which have been enacted in the several states of the American Union, *the life or lives of a person or of persons who are in being at the death of the testator must be selected as the measure of the period* during which the vesting of the fee can be validly suspended. Hence every devise, whether it be given absolutely or in trust, which by its terms forbids the sale of the fee simple of the property during an indefinite period of time which is not to terminate with the life or lives of living persons, or which suspends the alienation of the fee during a definite and fixed pe-

¹ In re Sayres' Trusts, L. R. 6 Eq. N. E. R. 259; Dulany v. Middleton, 72 Md. 67, 19 Atl. R. 146.

² Stuart v. Cockerell, L. R. 5 Ch. App. 713.

⁴ Thomas v. Gregg, 76 Md. 169, 24 Atl. R. 418.

³ Lawrence v. Smith, 163 Ill. 149, 45

riod not similarly measured, is void, irrespective of the length of the time during which the power of alienation is in abeyance. And it is not material whether the power of alienation shall be suspended for a month or for a hundred years after the death of the testator, provided the fee cannot be sold within a life or lives in being and twenty-one years thereafter.¹ Thus, in the state of New York and elsewhere, a gift which is to vest in a charitable corporation which is not in existence at the death of the testator, but which is to be incorporated at some time in the future, when the gift will vest in the corporation, is void, if the vesting is suspended for an indefinite period not measured by lives in being.

A suspension for a term of years, however short, is invalid; as, for example, a suspension of the power of sale for one year.² And the same rule was invoked in a well-considered case decided by the Lord Chancellor of England,³ where the testator bequeathed money in trust to be distributed among the children of A. who should be living at the end of twenty-eight years, and if no children of A. were living to the children of B. *then living*.⁴ In this case it will be noticed that the gift

¹ In re Walkerly's Estate, 41 Pac. R. 772, 108 Cal. 627; Anthony v. Anthony, 55 Conn. 256, 11 Atl. R. 623; Fowler v. Duhme, 143 Ind. 248, 42 N. E. R. 623; In re Stephens, 45 La. Ann. 962; Hooper v. Hooper, 9 Cush. (Mass.) 122, 129; Sears v. Putnam, 102 Mass. 5, 6; Farrand v. Pettit, 84 Mich. 671, 48 N. W. R. 156; Simpson v. Cook, 24 Minn. 180, 184, 1 Amer. Pro. R. 27, 32; Morgan v. Masterson, 4 Sandf. (N. Y.) 442; Trowbridge v. Metcalfe, 5 App. D. 318; Tucker v. Tucker, 5 N. Y. 408; Converse v. Kellogg, 7 Barb. (N. Y.) 590; Underwood v. Curtis, 127 N. Y. 523, 28 N. E. R. 585; In re Fisher, 8 N. Y. S. 10; In re Snyder, 21 N. Y. S. 430; Montagnini v. Blade, 74 Hun, 297, 26 N. Y. S. 670; Hone v. Van Schaick, 20 Wend. (N. Y.) 564; Burrill v. Board, 43 N. Y. 254; In re Underhill's Will, 6 Dem. Sur. 466, 3 N. Y. Supp. 205; Brandt v. Brandt, 34 N. Y. S. 684, 13 Misc. R. 431; Steinway v. Steinway, 10 Misc.

R. 563, 32 N. Y. S. 183; Haynes v. Sherman, 117 N. Y. 433, 22 N. E. R. 938; Henderson v. Henderson, 46 Hun, 509.

² Tucker v. Tucker, 5 N. Y. 408.

³ Palmer v. Holford, 4 Russ. 403.

⁴ A bequest to a charity, provided it shall raise a certain sum within two years after the death of the testator, is void. Booth v. Baptist Church, 126 N. Y. 215, 28 N. E. R. 238, holding also that a gift to an institution to be incorporated in the future is void. A provision by which a trust is created for the purpose of carrying on the business of the testator for a fixed period mentioned, or for an indefinite period to be determined by the testator's trustees, is not valid. Snyder's Estate, 21 N. Y. S. 430; Hamlin v. Mansfield, 88 Me. 131, 138. A direction that lands shall be sold by the executor when he shall see fit and the proceeds divided, but making no provision for the vesting

was to unborn persons who were to come into being during the illegal period of a term of years. A gift to a living person, as to A. *if he shall be alive at the end of a term of years*, a period not measured by lives, and, if he shall die, then absolutely on his death to others, is valid. No objection, upon the ground of remoteness, can be urged, for the fee is sure to vest either in A. during his life-time, if he survive the term, or in others immediately on his death.¹

A question may arise, where the power of alienation is attempted to be suspended for a fixed term of years, whether the provision is void altogether or whether it is to be sustained *cy pres*. The decisions are almost unanimous that the limitation is void *in toto*. Thus, if an estate is not to vest in fee under a will until the termination of a life and a period of twenty-nine years, the devise will not be valid for the life and a minority, the surplus of eight years being separated and rejected, but the whole devise is void. It has been held, however, in the state of New Hampshire, that a devise of a fee to grandchildren of the testator, "born or to be born," when the youngest of them should arrive at the age of forty, was not void because it was in contravention of the rule, but, under the doctrine of *cy pres* mentioned, the devise would vest in those grandchildren who were alive when the youngest grandchild "born or to be born" should attain the age of twenty-one years.²

§ 887. **The period is to begin at the death of the testator.** The condition of affairs which exists at the death of the testator determines whether the gift is void as a perpetuity. When it is said that a suspension of vesting during a life or lives in being is permitted, they must of course be such lives as are *in esse* at the death of the testator and not at the date of the will.³ Though the state of affairs is such that, should the testator die

of the fee in the beneficiary or for a final disposition of the estate, is invalid as an attempt to create a perpetuity. *Bigelow v. Cady* (Ill., 1897), 48 N. E. R. 974. So gifts of bank stock which are to be distributed among the employees of the bank during its existence under its present or future charter are void, as they might not vest within the pe-

riod of twenty-one years. *Siedler v. Syms* (N. J., 1897), 38 Atl. R. 424.

¹In *re Daveron*, 3 Reports, 685, (1898) 3 Ch. 421; *Bowen v. Churchill*, id.

²*Edgerly v. Barker*, 66 N. H. 434, 31 Atl. R. 900.

³*Mullread v. Clark*, 68 N. W. R. 989 (Mich., 1898); *In re Brooks*, 140 Pa. St. 84, 21 Atl. R. 240.

immediately *after* the execution of his will, the devise would be void for remoteness of vesting, nevertheless the will may be validated by events happening subsequently to the execution and during the life-time of the testator. So where money is given in trust for A. for life, and, *after his death*, to those of his children who shall attain the age of twenty-four, which will be invalid in case the testator dies before A. does, it will be a valid limitation to A.'s children if A. dies before the testator, since the devise, in this case, must of necessity vest within the lives of the children of A. who are living at his death.¹

§ 888. **Vested estates are not within the rule of perpetuities.**—The rule of perpetuities has no application to estates when the fee simple is vested. No devise by which the fee simple vests absolutely, either at the death of the testator or within the period of a life or lives in being and twenty-one years, is invalid merely because the possession and enjoyment are indefinitely postponed, or are postponed for a period not measured by lives in being.² If, by the language of the will, the estate is vested in some one who can alienate it absolutely, no suspension takes place, though a trust postponing the possession and enjoyment is attached to it.

The main difficulty in most cases is to determine whether the testator, by the language he has used, meant to postpone the vesting or merely to postpone the possession and enjoyment. This is altogether and purely a question of verbal construction, and the question whether the testator, from the words he has used in the will, intended to give a vested or a contingent estate, is always to be determined, regardless of the fact that the limitation created may ultimately be invalid as a perpetuity, provided it is found to be contingent after it shall have been construed.

¹ *Vanderplank v. King*, 8 Hare, 17; *Williams v. Teale*, 6 Hare, 251; *Peard v. Kekewich*, 15 Beav. 173.

² *Tarrant v. Backus*, 28 Atl. R. 46, 63 Conn. 277; *Dyson v. Ropp*, 29 Ind. 482; *Jordan v. Woodin*, 93 Iowa, 451, 465; *Phillips v. Harrower*, 93 Iowa, 92, 107, 61 N. W. R. 434; *Pulitzer v. Livingstone*, 89 Me. 359, 36 Atl. R. 635; *Tucker v. Bishop*, 16 N. Y. 402; *Savage v. Burnham*, 17 N. Y. 561;

Kirk v. Kirk, 12 N. Y. S. 326; *Sawyer v. Cubby*, 146 N. Y. 192, 40 N. E. R. 869, reversing 26 N. Y. S. 426, 73 Hun, 298; *Hillyer v. Vandewater*, 121 N. Y. 681, 24 N. E. R. 999; *Cooper's Estate*, 150 Pa. St. 576, 24 Atl. R. 1057; *Rhodes' Estate*, 147 Pa. St. 227, 23 Atl. R. 653; *Morgan v. Morgan* (R. L., 1898), 40 Atl. R. 736; *Potter v. Couch*, 11 S. Ct. 1005, 141 U. S. 296.

§ 889. **The effect of a power of sale to prevent the operation of the rule of perpetuities.**—The rule forbidding the creation of a perpetuity is not transgressed if the fee simple is absolutely alienable by some person who is in being at the death of the testator or who comes *in esse* during the period limited by the rule. Hence if the testator shall devise several estates for life in succession to persons who are in being at his death, and other life estates to classes of devisees who are not then in being, with a contingent remainder over, so that the vesting is postponed beyond the legal period, and at the same time the testator confers an absolute power of sale upon his executor or upon his trustees, by virtue of which *the fee simple may be conveyed at any time*, no perpetuity is created, for the fee simple, though not vested, is alienable.¹ The fact that the testator has not, in clear and express terms, directed that the power of sale *must be exercised within a life or lives in being and twenty-one years*, or within whatever period may be established by the statute, is not material, provided always that he has not expressly forbidden his trustees to exercise it within that period or postponed its exercise beyond the period of the rule. If it may be exercised at any time it is valid and does not infringe the rule.² So it matters not that the power of sale is discretionary in the trustee as to the *time and mode of its exercise*, as where it permits him to delay a sale until such time as he shall be able to secure a fair price, if the direction to sell is imperative and absolutely requires a sale within the period for the vesting of estates.³ It is generally held that

¹ In re Walkerly's Estate, 41 Pac. R. 772, 108 Cal. 627; Pulitzer v. Livingston, 89 Me. 359, 36 Atl. R. 635; Ford v. Ford, 80 Mich. 42, 44 N. W. R. 1057; Atwater v. Russell, 49 Minn. 22, 51 N. W. R. 624; In re Tower, 49 Minn. 371, 52 N. W. R. 27; Young v. Snow (Mass., 1896), 45 N. E. R. 686; Bruce v. Nickerson, 141 Mass. 403; Hillyer v. Vandewater, 121 N. Y. 681, 24 N. E. R. 999; Persons v. Snooks, 40 Barb. (N. Y.) 44; Hope v. Brewer, 136 N. Y. 473, 31 N. E. R. 515; Deagan v. Von Glahn, 75 Hun, 39, 26 N. Y. Supp. 989; In re Cooper's Es-

tate, 150 Pa. St. 576, 30 W. N. C. 532, 24 Atl. R. 1057; In re Myers, 11 Pa. Co. Ct. R. 194; Hughes v. Hughes, 91 Wis. 138; Barber v. Railroad Co., 17 S. Ct. 488. For cases illustrating powers of sale over lands which is devised, see §§ 782, 783.

² Biddle v. Perkin, 4 Sim. 136; Powis v. Capron, 4 Sim. 138; Waring v. Coventry, 1 Mylne & K. 249; Cole v. Sewell, 4 Drew. & War. 1, 32; Boyce v. Hanning, 2 Cr. & J. 384.

³ Atwater v. Russell, 49 Minn. 22, 51 N. W. R. 624. Compare In re Christie, 133 N. Y. 473.

no definite period need be named by the testator within which a sale *must* be made, if it is clear that a sale may be made at any time, or that a sale was intended to be made within a reasonable time.¹ Accordingly an imperative direction to sell "as soon as the trustees can conveniently do so,"² or at any time upon the demand or request of beneficiaries,³ is not in contravention of the rule. And, *a fortiori*, a direction that a sale *shall* be made *within a year* after the death of the testator is within the rule.⁴

Whether the insertion of a power of sale, which is only to be exercised upon the demand or with the consent of a beneficiary, is sufficient to take a case out of the rule of perpetuities, and whether such a power will operate as an indefinite power of sale, has been disputed. Where the time for the exercise of the power is left to the discretion of a beneficiary, and his choice is binding on the trustee, it is but substituting the discretion of the beneficiary for that of the trustee, and the general rule ought to apply. Thus, a naked power in an executor or a trustee to sell, at any time, on a demand of a majority of the beneficiaries to whom land is given absolutely in fee, imposes no illegal restraint upon the power of alienation, for all take vested estates which they may alien at any time.⁵ But where the exercise of the power of sale by a trustee is absolutely conditioned upon the consent of a court, or on the consent of a beneficiary, so that he may veto it in his discretion, the vesting is suspended, for the consent may be indefinitely refused.⁶

¹ In re Cooper's Estate, 150 Pa. St. 576.

² Hope v. Brewer, 32 N. E. R. 558, 136 N. Y. 126.

³ Deagan v. Von Glahn, 26 N. Y. Supp. 898, 75 Hun, 39.

⁴ Deagan v. Wade, 144 N. Y. 573, 39 N. E. R. 92.

⁵ In re Cooper's Estate, 24 Atl. R. 1057, 150 Pa. St. 576.

⁶ Fowler v. Ingersoll, 127 N. Y. 472, 28 N. E. R. 471.. The case of a devise of a vested estate in fee simple subject to a general power of sale in a trustee or in the executor, to be exercised at his discretion, differs from a future limitation to unborn

persons, which constitutes an illegal perpetuity, but which is subject to a general power of sale. In the former case there is no perpetuity. The devisees may alien the fee vested in them, and therefore the fact that the execution of the power of sale may be indefinitely postponed by the donee of it cannot create a perpetuity. And, on the other hand, if the devise is to persons unborn, so that an illegal perpetuity is created, the fact that some third person has a power by which, at any time, the absolute interest may be conveyed, cures the illegality of the limitation.

§ 890. **The rule of perpetuities in its relation to charitable gifts.**—It is commonly said in the cases that the rule of perpetuities is not applicable to gifts devised for charitable purposes. If by this is meant that property may be devoted to and employed for charitable purposes during an indefinite period, the statement is correct. But property given or devised to charitable purposes is never within the rule either against perpetuity or remoteness, unless either the title of the fee is not vested at the date of its devise, or unless the alienation of the fee is absolutely restrained. Ordinarily, a gift to a charity is a vested gift, the title to which passes *eo instanti* at the death of the testator, either to a charitable corporation or to a trustee appointed by the testator. The ownership of the fee-simple legal title to the property is not in abeyance during one instant, as it passes directly from the testator at his death to the devisee, whether corporate or individual. The devisee of the property for a charity may alienate the fee under the authorization of a court of equity if at any time its conveyance becomes necessary to the carrying out of the charitable intent of the testator. And though the property which has been devoted to a charitable purpose is, by reason of the peculiar character of that purpose, preserved intact, and its dispersion prevented for an indefinite period, the rule against remoteness of vesting is not infringed, for the legal title is and remains vested during the whole period, and the property may be sold at any time. But the essence of a charitable foundation is that it shall be permanent, and that the property involved shall remain in the same condition and ownership for a more or less lengthy and indefinite period. A church, hospital or school, and the land on which it stands, may endure for years or for centuries, though the trustees have power to sell it at any time. To this extent the devotion of property to charitable purposes of necessity takes it out of the market, for otherwise the fluctuating character of the ownership, which would be incident to permitting it to be traded in as freely as other land, would destroy its charitable utility and nullify the intention of the testator. Hence, it may with safety be said that if the legal title to the land is vested, its indefinite devotion to a valid charitable purpose, with the consequent restriction of the power of alienating the fee, unless on application to and with the ap-

proval of a court, does not create such a perpetuity as will invalidate the charitable gift.¹

The rule against perpetuities is not rendered applicable to charitable gifts merely because the fee is devised for a charitable purpose with *no express limitation to others by way of executory devise, on the failure of the charitable purpose*, of the reversion or the possibility of a reversion which remains. We shall see that an executory devise over, on the termination of a charity, may be void for remoteness of vesting.² Here it is to be considered whether the vesting of the fee simple is suspended because there remains in the testator or his heirs a possibility of a reversion. The interest in the heirs of the grantor or of the testator who gives property in fee to a charity is not an executory devise after a fee, the vesting of which is postponed indefinitely, but a possibility of acquiring a right of entry as soon as the charitable use shall cease. The devise for the charitable purpose is a fee on condition at the common law, which may endure forever. When the condition is broken, the reversion vests at once in the heirs of the testator, and they may recover the inheritance at once by ejectment. And although in most cases the condition of the charitable gift is implied rather than express, these principles are, *a fortiori*, always applicable where the charitable gift is upon an express condition subsequent. An actual entry on breach of the condition is re-

¹ *White v. Fisk*, 22 Conn. 31; *Goodrich's Appeal*, 57 Conn. 275, 18 Atl. R. 49; *Pendleton v. Kinney*, 65 Conn. 222, 32 Atl. R. 33; *State v. Griffith*, 2 Del. Ch. 392; *Abend v. McKendree College*, 174 Ill. 96, 50 N. E. R. 1052, 74 Ill. App. 654; *Richmond v. Davis*, 103 Ind. 449, 453; *Phillips v. Harrow*, 93 Iowa, 92, 107, 61 N. W. R. 434; *King v. Parker*, 9 Cush. 82; *Odell v. Odell*, 10 Allen (Mass.), 1, 6; *Dexter v. Gardner*, 7 Allen (Mass.), 243, 246; *Detwiller v. Hartman*, 37 N. J. Eq. 354; *Mills v. Davison* (N. J., 1897), 35 Atl. R. 1072; *Moore v. Moore*, 50 N. J. Eq. 554, 25 Atl. R. 403; *Williams v. Williams*, 8 N. Y. 525; *Levy v. Levy*, 33 N. Y. 97; *Bascom v. Albertson*, 34 N. Y. 584; *Holmes v. Mead*, 52 N. Y. 332; *In re Schuyler's Estate*, 24

N. Y. S. 847; *State v. Gerard*, 2 Ired. Eq. (N. C.) 210; *In re Lennig's Estate*, 154 Pa. St. 209, 25 Atl. R. 1049; *Hillyard v. Miller*, 10 Pa. St. 326; *Philadelphia v. Girard*, 45 Pa. St. 26; *Yard's Appeal*, 64 Pa. St. 95; *Franklin's Adm'r v. Philadelphia*, 13 Pa. Co. Ct. R. 241; *In re Smith's Estate* (Pa., 1897), 37 Atl. R. 114; *Webster v. Wiggins* (R. I., 1897), 31 Atl. R. 824, 826; *Franklin v. Armfield*, 2 Sneed (Tenn.), 305; *Wood v. Humphreys*, 12 Gratt. (Va.) 333; *Fadness v. Braunborg*, 73 Wis. 257, 41 N. W. R. 84; *Jones v. Habersham*, 107 U. S. 174, 185; *White v. Keller*, 68 Fed. R. 796, 15 C. C. A. 683. *Contra*, *Beurhaus v. Watertown*, 94 Wis. 617, 627; *Cottman v. Grace*, 112 N. Y. 299, 19 N. E. R. 839.

² § 891.

quired to be made by the heirs of the donor or of the testator. But the vesting of the fee or the power of alienating it is never for a moment suspended, because, until a breach of the condition, it is in the charitable trustee, to be exercised under judicial direction, while the right of entry may at any time be released by the heirs of the testator. After a breach of the condition and re-entry, the fee is, of course, absolutely alienable by the heirs of the testator.¹

§ 891. **Devises for charitable purposes may offend the rule when made to non-existent corporation.**—It has been elsewhere explained² that, at the common law, it is necessary to the validity of a grant in fee that the grantee named in it should be a natural person, or a corporation in existence at the time of the grant, and able to take livery of seizin. This is never necessary in conveyances which are meant to operate under the statute of uses or under that of wills. A freehold may be created to commence *in futuro* in a person not *in esse* at the date of the feoffment to use, or at the death of the testator³ with or without a precedent particular estate to support it. This may be done as well where the *cestui que use* or devisee who is to take the future estate is a corporation as where he is a natural person. But in the one case as in the other it is absolutely necessary that the unborn corporation shall be ushered into existence within the period which is permitted by the rule of perpetuities for the vesting of estates. Hence, it is a well-settled general rule that a devise to a charitable corporation which is not in existence at the date of the testator's death is valid if provision is made that the corporation *must* be incorporated within a life or lives in being and twenty-one years thereafter.

It is not material that the time when it shall be incorporated is left to the discretion of the executor or the trustees, or that it may be incorporated within an indefinite time, for example as soon as possible, when the date on or before which it must

¹Hopkins v. Grimshaw, 17 S. Ct. v. Framingham, 109 Mass. 303; First 401, 165 U. S. 342, 346; Cowell v. Society v. Boland, 155 Mass. 171; In Springs Co., 100 U. S. 55; Austin v. re Randell, L. R. 38 Ch. D. 213, 218, Cambridgeport, 21 Pick. (Mass.) 215; 219; In re Bowen, (1893) 2 Ch. 491, Gray v. Blanchard, 8 Pick. (Mass.) 494.
²Ante, § 829.
³§ 777.

be incorporated is within the limits of the rule. Where the purpose of the suspension of the power of alienation is *accumulation for a charitable purpose*, it has repeatedly been held that it is not material that the testator provides that the process of accumulation shall continue for an indefinite time, or for a period not measured by lives.¹ The same rule has also been applied where the primary purpose of the testator was not accumulation, but where the sole reason for the postponement of the vesting was that no charitable institution was in existence which could fulfill the particular charitable intention of the testator, or because he desired to perpetuate his name by the creation of a new one.

The courts, in construing trusts of this character, have usually invoked the definitely-settled principle that the rule of perpetuities has no application to charitable trusts.² But elsewhere it is maintained that every devise to a charitable corporation to be created in the future must take effect in a corporation which is incorporated within a life or lives in being and twenty-one years thereafter. And in the state of New York and elsewhere, where the limit of suspension by statute is two lives in being, a devise to a corporation to be incorporated is absolutely invalid unless the incorporation *must of necessity* take place within the statutory period.³

A gift in trust to executors or trustees, with an imperative direction that the fund shall be devoted to charitable purposes, but either expressly or by implication providing that the charitable institutions shall be selected by the executors or trustees, is not generally held to be in conflict with the rule of perpetuities, even though no time is fixed by the will within which the beneficiaries must be selected.⁴ The power created and the discretion conferred upon the trustees are personal to them and cannot be delegated or transferred to a new trustee. Hence the power in trust endures only for the lives of the trustees,⁵ and the rule of perpetuity is not infringed.

§ 892. Devise over on the termination of a charity — When void for remoteness.—An executory devise of a fee to A.,

¹ § 902.

⁴ *Ante*, § 832.

² See *ante*, § 890.

⁵ *New Haven Y. M. Ins. v. City of*

³ *In re Wood's Estate*, 55 Hun, 204, 7 N. Y. Supp. 836; *People v. Simonson*, 55 Hun, 605, 7 N. Y. Supp. 861. *New Haven*, 60 Conn. 32, 22 Atl. R. 447.

which is to vest in him *after* the termination of a prior estate in fee which is given to charity, is absolutely void for remoteness, if the nature of the contingent event which is to terminate the estate of the charity is such that it may, by any possibility, not happen within the period which, by the rules of law, is established for the vesting of estates. The executory devise is a void conditional limitation for the reason that, prior to the happening of this contingent and uncertain event, no person is in being who is able to give an absolute and indefeasible conveyance of the fee simple of the property.¹ And, on the other hand, where a devise of the fee is made to an individual, with an executory devise over to a charity upon a contingency which may or may not occur within the period required under the rule prohibiting the remoteness of vesting, the devise over is void because it is too remote, and the person designated takes absolutely. So where the devise is to A. in fee, and, upon a general failure of his issue, to a charity; or where it is to A. and his heirs, they paying an annuity to a charity, and, on their failure to pay, then to the charity in fee;² or a devise to persons belonging to particular families, with a devise over of the fee to a charity upon the family becoming extinct,³ the gift to the charity is invalid.⁴ A devise in fee to one charity, and, on a contingency, then in fee to another charity, is valid, though the contingency on which the fee is to go over may not happen within the limits of the rule against remoteness. The estate is *all charity*. No individual is concerned, as the fee passes at

¹ Hopkins v. Grimshaw, 165 U. S. 342, 355; Russell v. Allen, 107 U. S. 168, 171; Jones v. Habersham, 107 U. S. 174, 185; McArthur v. Scott, 113 U. S. 340, 381; Brooks v. Belfast, 90 Me. 318, 324; Theological Educ. Soc. v. Attorney-General, 135 Mass. 285; Wells v. Heath, 10 Gray, 25, 26; Odell v. Odell, 10 Allen (Mass.), 1, 6; Palmer v. Bank, 17 R. L. 627, 24 Atl. R. 109; In re Tyler, (1891) 3 Ch. 252. An executory devise to A. after a gift in trust for the support of schools, upon a condition that the devise to A. should take effect immediately if at any time the government should establish a general system of free public

education, is void under the rule of the text. In re Bowen, 3 Reports, 529, 2 Ch. (1893), 461.

² Jackson v. Phillips, 14 Allen (Mass.), 572; Brattle Square Church v. Grant, 3 Gray (Mass.), 142, 154; Merritt v. Bucknam, 77 Me. 253, 259, 262.

³ Commissioners of Donations v. Clifford, 1 Dru. & W. 240, 253.

⁴ Company of Pewterers v. Christ's Hospital, 1 Vern. 161. See Appeal of Appleton, 136 Pa. St. 354, 20 Atl. R. 521, where there was a devise to a charity after a gift to four individuals for their joint lives, and Parker v. Churchill (Ga., 1898), 30 S. E. R. 642.

once from one charitable trustee to the other. No greater restriction is placed upon the power to alienate by devising to two charities in succession than by a devise to a single one.¹ Thus, where land was in the year 1624 devised to a municipal corporation for charitable purposes, with a devise over to Christ's Hospital in default of a valid execution of the trust, it was held, two hundred and twenty-four years later, that the devise to the hospital should be sustained.²

§ 893. The suspension of the power of alienation during minorities.—A suspension of the vesting of the fee during one or more minorities does not violate the common-law rule of perpetuities if the minorities are of persons who are in being at the death of the testator, or who will come into being during life or lives. Thus, a devise in trust for the benefit of A. to pay him the income until the "youngest of the children of the testator shall attain the age of twenty-one years," if living, or if dead would have reached that age had he lived, suspends the vesting no longer than twenty-one years and a possible period of gestation after the death of the testator.³ And it is not material how many minorities are designated by the will to measure the period of the suspension of vesting, for in any and every case the period of suspension cannot exceed the majority of the *youngest* minor who is living or *en ventre sa mere* at the death of the testator. A suspension for minorities is valid at common law, even though the minors shall not be *in esse* at the death of the testator, if, though then unborn, they must necessarily be born within the life-time of persons then living or within a possible period of gestation.

A statute which by its terms expressly enacts that the common-law rule of perpetuities shall be no longer in force, but that the vesting of the fee shall not be suspended for a longer period than two lives in being, no mention being made in the statute of minority, as is the case in the common-law rule, has been held to permit a suspension for minorities, but not for more than two. In such a limitation the suspension of the vesting of the

¹ *Society for Propagating the Gospel v. Attorney-General*, 3 Russ. 142; *McDonough v. Murdock*, 15 How. (U.S.) 367; *Storrs' School v. Whitney*, 54 Conn. 342, 8 Atl. R. 141.

² *Christ's Hospital v. Granger*, 16 Sim. 83, 100, 1 M. & G. 460.

³ *Otterback v. Bohrer*, 87 Va. 548, 12 S. E. R. 1013. Cf. *Jordan v. Woodin*, 93 Iowa, 453, 61 N. W. R. 948.

fee cannot outlast the lives of those persons whose minorities are taken, and it may possibly terminate sooner, that is, on their attaining majority. The suspension cannot possibly be for a longer period than during the lives of the two minors, and it may ultimately be for a much shorter period in case they attain majority and live for many years thereafter.

In the state of New York, where the limit of suspension is two lives in being, by the early cases a minority of a minor alive at the death of the testator has been held to be equivalent to a life in being, and suspensions for two minorities, though no more, have been sustained.¹ Thus, a direction to trustees to hold the property of the testator in trust until the "youngest child of the testator" should attain the age of twenty-one, and then to divide it among a class of beneficiaries, was held not to cause an invalid suspension of the vesting of the fee.² Indeed it seemed to be well established in that state down to a recent date, that a suspension of alienation until the *majority of the youngest child of the testator* was valid, being regarded at the utmost only as a suspension for the life of a person in being, *i. e.*, the youngest child, and not for a gross term of years not measured by a life or lives in being.³ But a contrary rule has recently been established. In a case where property was placed in a trust for the benefit of the wife of the testator "until the majority of the youngest child *now living or who would arrive at that age if living*," the court held that the trust was invalid as suspending alienation for a term of years, and not for a period measured⁴ by a life or lives in being.⁵

§ 894. The separation of gifts to classes not permitted.—The fact that some of the members of a class to which an

¹ Hawley v. James, 5 Paige (N. Y.), 318; Thompson v. Clendenning, 1 Sandf. Ch. (N. Y.) 387; Scott v. Monnell, 1 Redf. (N. Y.) 441; Jennings v. Jennings, 7 N. Y. 547; Boynton v. Hoyt, 1 Denio (N. Y.), 53. And so, too, in Minnesota. Simpson v. Cook, 24 Minn. 180, 1 Am. Prob. R. 27, 32.

² Levy v. Hart, 5 Barb. (N. Y.) 248; and see also McGowan v. McGowan, 2 Duer (N. Y.), 57, where a division was to be made when the eldest of seven children attained his majority.

³ See the recent cases of Stehlin v.

Stehlin, 22 N. Y. Supp. 40, 67 Hun, 110, and Horndorf v. Horndorf, 34 N. Y. Supp. 560, 13 Misc. R. 343.

⁴ A disposition involving the exercise of a power of sale on the attainment of majority by one of three persons who took subject to the power was sustained. In re Christie, 59 Hun, 153, 13 N. Y. S. 202. See also Walsh v. Waldron, 17 N. Y. S. 829, 63 Hun, 315.

⁵ Haynes v. Sherman, 117 N. Y. 433, 22 N. E. R. 938, 51 Hun, 585, 4 N. Y. S. 413.

executory devise is given which is void under the rule are in being at the death of the testator or have come into being during the period which is at the basis of the rule, while others are not or have not come into being, does not always prevent the failure of the whole limitation to the class. Thus, for example, we will take a limitation which occurred in an English case where personal property was bequeathed to A. for life, and *after* his death to his children who shall attain the age of twenty-five years, and if A. shall die leaving no children him surviving, or if he shall leave any that shall all die before they attain the age of twenty-five, then to the *brothers and sisters of A. in fee*.

The executory devise to brothers and sisters of A. is to a class which may not be ascertainable until *at least* twenty-five years after the death of A. It will consist of all the brothers and sisters of A., who must, of course, be born in his life or within twenty-five years thereafter. It cannot be known, therefore, until at least twenty-five years after the death of A., whether the fee simple will vest and be alienable in the children or in the brothers and sisters of A. The latter event will happen if no child of A. survives his twenty-fifth birthday. The membership of the class "*brothers and sisters*" cannot be ascertained until that time, and, though it may happen that at the death of the testator there may be several members of that class alive who may take if they survive, there *may be others* born within the period above mentioned and beyond the limits of the rule, for the rule of perpetuities has regard to what *may possibly happen*, and not to events which actually happen. To split up the class, which is indivisible and composite, because some members are or have come into existence during the period allowed by the law, though others do not, and to give to the former sub-class their shares while depriving the others of their benefit, is in no case what the testator intended to do by such a disposition of his property. To do this would be in effect to confer particular bequests upon one or more legatees as individuals, that is, upon those members of the class, "brothers and sisters," who may have come into being within the period permitted by the rule against perpetuities.¹

¹ *Leake v. Robinson*, 2 Mer. 363. In discussing this case Sir W. Grant, M. R., said: "The bequests in question are not made to individuals, but to classes, and what I have to determine is, whether the class can

The fact that the devise to a class which is too remote is coupled with a devise to an individual named, which is to vest in him only if he survive, is not material. His devise fails with the remote gift to the class, though he may survive until the period named, for it is impossible to separate the whole fund into shares and to ascertain how much the individual named would take, where he is to take as a tenant in common with the members of a class which is too remote.¹

If, however, the valid and invalid provisions contained in the same will are each complete in themselves, and independent of the others, so that they may be separated without injustice to any person, and it appears that the testator intended they should be separated, this intention should be respected. The provision or limitation which transgresses the rule of perpetuities may be cut off, while that which does not offend the rule may be supported.² So where the devise was a certain specific amount to each child that should be born to any son of any brother of the testator, it was supported as to all children of the sons of the brothers of the testator who were in being at the death of the testator, though defeated as to those subsequently to be born, and who, as a class, would be too remote.³ And though a limitation made by a residuary clause is

take. I must make a new will for the testator if I split into portions his general bequest to the class and say that, because the rule of law forbids his intention from operating in favor of the whole class, I will make his bequests what he never intended them to be, viz., a series of particular bequests to individuals, or, what he has as little in his contemplation, distinct bequests, in each instance, to different classes, namely, to grandchildren living at his death, and to grandchildren born after his death." In a recent Illinois case will be found a good illustration of the rule of the text. The testator created a trust to pay A. a life annuity, and on A.'s death to pay annuities to A.'s children until they severally attained the age of twenty-five, and when the youngest attained the age of twenty-five

then to all A.'s children in fee. As the provision relating to final distribution was void, the whole trust failed, and the gifts of the annuities to the children of A. who were living at the death of the testator also failed. *Lawrence v. Smith*, 163 Ill. 149, 45 N. E. R. 259. See also *In re Whitten*, 62 Law Times, 391.

¹ *Porter v. Fox*, 6 Sim. 485. That a gift cannot be split up into several gifts to take effect on separate contingent events, some within and some beyond the period of the rule, see *In re Bence*, 64 Law Times, 382, 3 Ch. (1891), 242; *Post v. Rohrbach*, 142 Ill. 600, 32 N. E. R. 687.

² *Kennedy v. Hoy*, 105 N. Y. 524, 11 N. E. R. 390; *Underwood v. Curtis*, 127 N. Y. 523, 28 N. E. R. 585.

³ *Storrs v. Benbow*, 3 D. M. & G. 390.

void because in violation of the rule of perpetuities, specific legacies to the same legatee ought to be supported.¹ So, where property is limited in a valid trust for life, with a remainder in fee over, and the remainder is void because it infringes the rule of perpetuities, the gift for life, if it is severable, will stand, though the limitations over may fail for remoteness of vesting, and the testator may die intestate as to the fee comprised in the executory limitations.²

§ 895. **The circumstances under which class gifts may be separated.**— There have been some cases where the courts have held that it was allowable to separate a contingent provision for a future class, where some of the members of the class have come or must come into being beyond the legal period, and to sustain the provisions for the class as to those members of it who are actually in being within the rule of perpetuities, while letting it fail as to those who are not.

Thus, where the testator devised land to A. for his life, he being alive at the death of the testator, remainder to his children for their lives, and remainder in fee to *their* children; and A. left several children surviving, *some* of whom were born *before*, and *some after*, the death of the testator, the court separated the limitation to the children of A., and held that the shares of the children who were born *before* the death of the testator should go to *their* children in fee on their death. But the devise of the remainder failed as to the grandchildren of A. whose parents were born *after* the death of the testator.³

¹ Lawrence v. Smith, 163 Ill. 149, 45 N. E. R. 259.

² Morris v. Bolles, 31 Atl. R. 538, 65 Conn. 45; Ketcham v. Corse, 31 Atl. R. 486, 65 Conn. 85; Leake v. Watson, 60 Conn. 498, 21 Atl. R. 1075; Marion v. Williams, 20 D. C. 20; Ingraham v. Ingraham, 169 Ill. 432, 48 N. E. R. 461; Bugbee v. Sargent, 23 Me. 269; Dulany v. Middleton, 72 Md. 67, 19 Atl. R. 146; Deane v. Littlefield, 1 Pick. (Mass.) 239, 243; Holman v. Perry, 4 Met. (Mass.) 492, 497; St. Paul's Church v. Attorney-General of Massachusetts, 164 Mass. 188, 195; Dean v. Mumford, 102 Mich. 510; Harrison v. Harrison, 36 N. Y. 543,

547, 548; Manice v. Manice, 43 N. Y. 303, 384; Van Schuyver v. Mulford, 59 N. Y. 426, 432; Kennedy v. Hoy, 105 N. Y. 134, 137, 138; Underwood v. Curtis, 127 N. Y. 523, 541; Brown v. Richter, 76 Hun, 469, 27 N. Y. Supp. 1094; Law v. Maxy, 13 N. Y. Supp. 366; Haynes v. Sherman, 51 Hun, 685; Schermerhorn v. Cotting, 131 N. Y. 48, 29 N. E. R. 980; Allen v. Allen, 149 N. Y. 280, 287; Armstrong v. Douglas, 89 Tenn. 219, 14 S. W. R. 604; Saxton v. Webber, 83 Wis. 617, 53 N. W. R. 905.

³ Cattlin v. Brown, 11 Hare, 372, 382; Griffiths v. Pownall, 13 Sim. 393; Knaping v. Tomlinson, 34 L. J. Ch.

Testamentary executory provisions for unborn classes may also be separated, and the part which vests within the legal period may be sustained, though the balance is permitted to fail, where, by the terms of the limitation, a class of devisees is to take by substitution a contingent interest in the share of any member of another primary and original class who dies before the vesting in that class. An example of this would be an estate in A. for life, he being a living person, remainder to his children in fee when they severally attain the age of twenty-one, and if any child shall die in his minority, then to *his* issue.¹ The remainder in fee by substitution to the issue of a deceased child is valid so far as the shares of children in being at the death of the testator are concerned, for the remainder is certain to vest, if at all, during A.'s life, or within twenty-one years thereafter. It vests in the children of A. if they attain majority, or in their issue if they are dead. But the remainder in fee to issue is void as to the issue of the children of A. who are born *after* the death of the testator, for such children are not in being at the death of the testator, and consequently the fee cannot go in their issue until both they who are unborn at the testator's death, and their parent, A., are deceased, and also after a majority, which is not within the period. Here, then, are two classes, one of children and one of grandchildren. *All* the children will certainly come into being during A.'s life, and possibly *some* of the grandchildren. But some of the grandchildren may not, for their parent, the child of A., may be *en ventre sa mere* at A.'s death. But when the number of A.'s children is ascertained and fixed by *his* death, we have found the number of shares and also how many stocks into which the

8, 7. The distinction between these cases and that of *Leake v. Robinson* is that in these cases so soon as it can be definitely ascertained how many surviving children of A. there are, which of course is at his death, no matter when they are born, the property can be divided into as many shares as there are surviving children. The shares of those children of A. born *before* the death of the testator can be then delivered to them, if alive, for life (with contin-

gent remainder to their children), or, if dead, to their children in fee, while the other shares meant for the issue of the children who are afterwards born, not vesting until the subsequently born children are themselves deceased, must of necessity be void. In *Leake v. Robinson* the class was not thus divisible, and its membership was only to be ascertained at a date which was absolutely too remote.

¹ See *ante*, §§ 353, 355.

testator meant his property to be divided; and, this fact having been ascertained, the issue that may proceed from each member of the original class forms a secondary and substitutionary class which is distinct and separate from the issue of any and every other member of the original class.

But on the other hand, where, in a similar limitation to that above mentioned, it appears that the children and the grandchildren form together *one composite and original class*, the membership of which cannot be ascertained within the legal period, the whole gift fails, though some of those who make up the membership of the class have been born before the death of the testator. If some of the members of the class are to be the unborn children of persons not in being at the death of the testator, and the share of each and any member cannot be ascertained until all these persons are in being, the whole limitation is so permeated with remoteness that it must be cut off altogether. Thus, a devise of a contingent remainder was to the children of a life tenant (A.) living at his death, and to the descendants of all his children who are then deceased, with a devise over, if no children or descendants of A. shall attain their majority, to the children of B. living at *his* death and the descendants of those deceased. The contingent remainder to the descendants of the children of A. was to such only as were living at A.'s death, and they took by substitution the shares of their parents as separate stocks.¹ So the rule of perpetuities is not in any respect infringed by a devise in trust for a child of the testator for life, and at his death to be divided among his children "*then*" living, and the issue of any deceased child. The living children of the life tenant take as one class, and the descendants of his deceased children take as another. There are thus two separate classes, both of which are ascertainable within the life of A.²

§ 896. The effect of the invalidity of a devise on the next expectant limitation following it.—All future contingent limitations which are to vest upon the termination of a prior limitation which is void because it is in violation of the rule of perpetuity are also void, and are not accelerated because the

¹Terrell v. Reeves (Ala., 1898), 16 S. R. 54. See *ante*, §§ 353-355.

²In re Siddall's Estate, 180 Pa. St. 127, 36 Atl. R. 570.

prior estate is invalid.¹ If the later interest depends for its vesting upon an event which puts an end to the former estate, both are void. The reason is obvious. Thus, if the contingent event, on the *happening* of which an interest which up to *that time* has been contingent is to become vested in fee in class A., is the same event on the *non-happening* of which the *same* property is to vest in fee in class B., both must necessarily be valid or neither. For the non-happening of the event is, so far as class B. is concerned, as much a contingent and doubtful event as its happening is to class A. If it happens, the fee vests in one class of persons. If it does not, the fee vests in another. Both classes are equally beyond the period mentioned by the rule and both devises are void.

So, too, the testator undoubtedly meant to give to both classes, and he cannot be assumed to have meant that a contingent and indefinite class B. shall take a vested fee on the happening of an event which renders his disposition in favor of class A. invalid. Thus, where personal property was to go for life to A., and on his death to his children, to vest in them when they shall attain the age of twenty-seven, and if no such children, then over,² or where property was given to the first son of A. on his becoming a clergyman, which he could not become until he was twenty-four years of age, but if no such son then over, and the fee never vested in the first devisee because the contingency never happened, it could not vest in the alternative devisee.³

If, however, the ultimate limitation which is to vest the fee depends not upon a *single* event, but upon an alternative contin-

¹ This rule does not apply to future vested estates coming after void limitations. See § 878.

² *Cambridge v. Rous*, 8 Ves. 12, 25 Beav. 409.

³ In *Monypenny v. Dering*, 2 D. M. & G. 145, on page 182, the court said a limitation was invalid, "not because it was within the line of perpetuity, but expressly on the ground that the limitation over was never intended by the testator to take effect, unless the persons whom he intended to take under the previous limitation would, if they had been

alive, have been capable of enjoying the estate, and that he did not intend that the estate should wait for persons to take in a given event, where the person to take (that is, to take in the interim) was actually in existence, but could not take. This shows that where there are gifts over which are void for perpetuity, and there is a subsequent and independent clause on a gift over which is within the line of perpetuities, effect cannot be given to such a clause unless it will dovetail in and accord with previous limitations which are valid."

gency, or upon two contingencies, the rule is otherwise. If the vesting of the estate over depends upon the happening of either of two contingent events, one of which is certainly within the period of life or lives in being, though the other may not be; and the event which is within the period happens, while that which is beyond the period does not happen, the validity of the limitation will be determined by the event which has happened, and not by that which has not. Thus, where there is a limitation in fee to a class of persons, including the unborn grandchildren of a life tenant, which is void, with a devise over of a *vested remainder* to A., in case the grandparent, who is living at the death of the testator, dies leaving no issue surviving him at his death, and the latter event happens, the devise to A. is valid. For the same reason a contingent remainder in fee to a class in the above example, upon the death of the grandparent, the life tenant, without issue living at his death, would also be valid, if it should so happen, for the devise to the class is bound to vest within the legal period, though a provision for unborn issue of the life tenant coupled with it might fail together.¹

¹ "But if the testator distinctly makes his gift over to depend upon what sometimes is called an alternative contingency, or upon either of two contingencies, one of which may be too remote and the other cannot be, its validity depends upon the event; or, in other words, if he gives the estate over on one contingency which must happen, if at all, within the limit of the rule, and that contingency does happen, the validity of the distinct gift over in that event will not be affected by the consideration that upon a different contingency, which might or might not happen within the lawful limit, he makes a dispensation of his estate which would be void for remoteness. The authorities upon this point are conclusive." *Jackson v. Phillips*, 14 Allen (Mass.), 572. The court cites *Longhead v. Phelps*, 2 W. Bl. 704; *Beard v. Westcott*, 5 Taunt. 393, 395, 5 B. & Ald. 801, 809, 813, 814; *Minter*

v. Wraith, 13 Sim. 52; *Evers v. Challis*, 7 H. L. Cas. 531. And see also *Lewis on Perpetuities*, ch. 21; *Goring v. Howard*, 16 Sim. 395; *In re Weinbrenner's Estate*, 34 Atl. R. 314, 173 Pa. St. 440. Where two contingent remainders are limited as substitutes or alternatives,—one to take effect if the other does not,—the fact that the contingency on which one is to take effect is too remote does not affect the validity of the other. *Walker's Adm'r v. Lewis*, 90 Va. 578, 19 S. E. R. 258. A devise to trustees for the children of a person in being, should he have any, and, in case he should have none, to other persons named, is a devise upon alternative contingencies; and, if the first contingency never happens, the second disposition will take effect, though the first devise may have been void as creating a perpetuity. *Perkins v. Fisher*, 59 Fed. R. 801.

§ 897. The statutory regulations of the law of perpetuities in the United States.—The rule of the common law, by the operation of which the suspension of the power of alienating the absolute interest in property is restrained to life or lives in being and twenty-one years thereafter, prevails throughout the United States where it has not been expressly repealed or modified by statute.¹

In the states of Iowa,² Georgia,³ Kentucky,⁴ North Dakota,⁵ Pennsylvania,⁶ California,⁷ Wisconsin,⁸ Michigan,⁹ and perhaps in several other states which have escaped the investigation of the writer, the common-law rule has been expressly confirmed by statute. In the state of New York and in one or two other states, according to existing statutes, the vesting of the fee cannot be suspended longer than during two lives in being at the creation of the estate or at the death of the testator. And no term of years whatever is permitted to be added to this limited period.¹⁰ If the statute does not expressly or by necessary implication refer to personal property, the rule of the common law prevails as to that.¹¹

§ 898. The rule of perpetuities in Connecticut.—The statute in Connecticut provides that “no estate shall be given by deed or will to any persons but such as are in being at the time of the delivery of the deed, or at the death of the testator, or to their immediate issue.”¹² A trust for A. and his family is not invalid under this statute, as it can endure only so long as A. is the head of the family, that is to say, only during his life-

¹ In re Hendy's Estate, 118 Cal. 656, 50 Pac. R. 753; Chilcott v. Hart, 23 Colo. 40, 45 Pac. R. 391; Madison v. Larmon (Ill., 1898), 48 N. E. R. 556; Hale v. Hale, 125 Ill. 399, 17 N. E. R. 470; Lawrence v. Smith, 163 Ill. 149, 45 N. E. R. 259; Rhoads v. Rhoads, 43 Ill. 239; Slade v. Patten, 68 Me. 480, 482; Hosea v. Jacobs, 98 Mass. 65, 67; Lovering v. Worthington, 106 Mass. 86, 88; Pratt v. Alger, 136 Mass. 550, 551; Woodbridge v. Winslow, 170 Mass. 390, 49 N. E. R. 738; Brown v. Brown, 2 Pickle (Tenn.), 277, 6 S. W. R. 869.

² Code, § 1920.

³ Civil Code, § 3112; Code 1873, § 2267.

⁴ Gen. Stats., ch. 63, art. 1, § 27.

⁵ Comp. Laws, § 2717.

⁶ Act April 18, 1853.

⁷ Code, §§ 715, 716.

⁸ Rev. Stats, § 2039.

⁹ How. Ann. Stats., § 5531.

¹⁰ Rev. Stats. of New York (7th ed.), p. 2179, § 15.

¹¹ In re Tower's Estate, 49 Minn. 371, 52 N. W. R. 27; Dodge v. Williams, 46 Wis. 70, 95, 50 N. W. R. 1103; Webster v. Morris, 66 Wis. 366, 382.

¹² Gen. Stats., § 2952.

time.¹ A testamentary provision for five children of the testator by name for life, and on the death of the survivor of such children to be divided among the surviving grandchildren and their heirs, is invalid. The remainder does not vest in the immediate issue of the children at the death of the testator, but in the grandchildren of the testator who are living at the death of the last surviving child, and in the issue of those then dead as purchasers.²

And it seems that in the state of Connecticut the general rule is, under this statute, that any future estate which is to vest in a class, the membership of which is to be determined at the termination of one or more precedent life estates, is void as a perpetuity, though the class consists of the immediate issue or descendants of some or all of the life tenants.³ Every contingent remainder, therefore, to the children of a life tenant as a class, where the children of a deceased member of the class are to take their parent's share, is void,⁴ as the grandchildren take as purchasers their parent's share, and not by inheritance, and some of them may possibly not be in being at the death of the testator. So, too, a devise of a future estate to the heirs of the survivor of a class, to vest in them after a prior life estate, is also void.⁵

§ 899. Cases illustrating the New York rule of perpetuities.—In the state of New York the limit of the rule of perpetuities is two lives in being, and no more. The following illustrations, selected out of the very many cases which have been determined in that state, will serve to show the attitude of the courts of that state upon this point:

A devise in trust for the support of the children of the testator during the lives of the two youngest children;⁶ or to support A. and B. for their *joint* lives, and, on the death of the survivor, to vest in others;⁷ or to support the widow and chil-

¹ *St. John v. Dann*, 66 Conn. 401, 34 Atl. R. 110.

² *Morris v. Bolles*, 65 Conn. 45, 31 Atl. R. 538.

³ *Johnson v. Webber*, 65 Conn. 501, 23 Atl. R. 506; *Beers v. Narramore*, 61 Conn. 13, 22 Atl. R. 1061.

⁴ *Landers v. Dell*, 61 Conn. 189, 23 Atl. R. 1083.

⁵ *Ketchum v. Corse*, 31 Atl. R. 486, 65 Conn. 85. The provisions of the Ohio statute are identical with those of Connecticut (Act Dec. 17, 1811). *Phillips v. Herron* (Ohio, 1898), 45 N. E. R. 720.

⁶ *Gilman v. Reddington*, 24 N. Y. 9.

⁷ *Onderdonk v. Onderdonk*, 5 N. Y. Supp. 242, 52 Hun, 614.

dren of the testator during the life of the widow;¹ or in trust for the widow of the testator for *her* life, and, on her death, to be divided into three separate life estates;² to pay income to A., B. and C. during *their* lives, and, if A. survive them, to him in fee, but if he die before C. and B., then to such persons as he may by will appoint;³ to pay the income of a fund to A. and B. for seven years, and at the end of that time the principal to go to the survivor of A. and B., but if *both* be dead, then to the heirs of C.;⁴ to pay income to A. for ten years, at the expiration of which time the *corpus* is to vest in A., or, if he die prior thereto, in B., and if A. and B. shall both die prior thereto then to C. and D., or the survivor of them, and if both C. and D. shall die then over;⁵ and a devise in fee to the surviving children of the testator who may be living at the death of a life tenant, and to the *then* living issue of any child of the testator who may then be deceased, to be divided among the issue when they attain the age of twenty-one years,⁶ are valid, as they do not suspend the vesting more than two lives in being at the death of the testator. A devise to A. for life, on his death to B. and C. for life *jointly*, and to the survivor of B. and C.;⁷ or to A. for life, with a remainder for life to all the children of the testator surviving A.;⁸ or a trust to pay income to A. for life, then to B. and C. for life, and to the survivor of them, and, on his death, to the children of the survivor, but if all die without issue then to D.;⁹ or to three persons for their *joint* lives, and to the survivor, and, on his death, to others;¹⁰ or a similar devise to three for life, and if they die without issue then as the law directs;¹¹ to the widow of the testator for her life and then to his daughter, and, if she die

¹ Williams v. Conrad, 30 Barb. (N. Y.) 524.

² Parks v. Parks, 9 Paige (N. Y.), 107. Cf. Schermerhorn v. Cotting, 131 N. Y. 48.

³ Bird v. Pickford, 35 N. E. R. 938, 141 N. Y. 18, reversing 25 N. Y. Supp. 46. This is only for one life — that of A.

⁴ Montagnini v. Blade, 39 N. E. R. 719, 145 N. Y. 111.

⁵ Montagnini v. Blade, 39 N. E. R. 719, 145 N. Y. 111.

⁶ Vanderpoel v. Lowe, 112 N. Y. 167, 19 N. E. R. 481.

⁷ Arnold v. Gilbert, 5 Barb. (N. Y.) 190; Van Schuyver v. Mulford, 59 N. Y. 426.

⁸ Post v. Hover, 33 N. Y. 593.

⁹ Knox v. James, 47 N. Y. 389; Westervelt v. Westervelt, 1 Bradf. (N. Y.) 137.

¹⁰ Fowler v. Ingersoll, 50 Hun, 604, 2 N. Y. Supp. 833.

¹¹ Ward v. Ward, 105 N. Y. 66, 11 N. E. R. 373.

before her husband and without children, then to him for life;¹ to four persons for their *joint* lives, and, on the death of any of them, to divide among the survivors and the children of those then deceased;² to A. for life and then to his children, with a devise to B. in case all the children shall die under age;³ or a devise in trust to pay annuities to the grandchildren of three persons named until the death of their (the grandchildren's) parents, which would be at least for six lives,⁴ is an invalid disposition, as in each case the period of two lives is exceeded.

An appointment by the holder of a life estate under a will to A. for life, remainder to A.'s descendants, is valid, where *both the life tenants were living when the original will was executed.*⁵ A direction to pay the income of a fund to A. for his life, and, on his death without issue him surviving, then half of the income to B. for his life, and half of the income to C. for his life, is valid.⁶ So, too, is a devise to A. for life, and then to be equally divided between B. and C. for their lives, and on the death of each one, then his share to go to his children.⁷ A clause devising a fund which had been attempted to be devised in trust for a purpose which may prove illegal "in the event that this bequest and devise . . . should be adjudged or prove invalid, or its execution be impossible either by judicial decree or from any other cause," does not suspend the vesting for an illegal period, the length of which is to be measured by the time it shall require for the court to reach a decision. The estate vests at once upon the death of the testator, as the decision of the court, when it is reached, relates back and determines the state of the law as it was at that date and not as it is at the date when the decision is reached.⁸ A trust for the benefit of A., B. and C. for life, remainder in the share of the principal to the children of each on his death, and in the case of

¹ Woodruff v. Cooke, 47 Barb. (N. Y.) 304. point, Frear v. Pugsley, 30 N. Y. Supp. 149, 9 Misc. R. 316.

² Colton v. Fox, 6 Hun, 49.

⁶ Weller v. O'Brien, 23 N. Y. Supp. 366.

³ Kennedy v. Hoy, 105 N. Y. 524, 11 N. E. R. 390.

⁷ Trolan v. Rogers, 79 Hun, 507, 29 N. Y. S. 899.

⁴ Lorillard v. Coster, 5 Paige (N. Y.), 172.

⁸ Cruikshank v. Chase, 21 N. E. R. 64, 113 N. Y. 337.

⁵ Hillen v. Iselin, 144 N. Y. 365, 39 N. E. R. 368. See also, on this

the death of any one of the life tenants leaving no children, his share to the other life tenants, and on the death of all three the principal to go to the surviving children, if any, is void as to the limitation over to the surviving children. But the life estate, and the limitation over in case of the death of any life tenant without children, is valid, and will be sustained though the other limitation is void as in violation of the statute.¹ And the same rule is applicable where the trust is for the life of A., and on his death to be divided into shares for several legatees, with cross-remainders on the death of any life tenant without issue.² A devise in trust to pay the income to each of the testator's eight children during their lives, and after their death to their respective husbands or wives, and if any should die without leaving a husband or a wife, or without issue, and leaving a husband or wife him or her surviving, then to the survivors, is valid and does not suspend the power of alienation for a longer period than for the life of the beneficiary and the husband or wife surviving him or her. In this case it is evident from the context of the will that the testator meant the husband or wife living at the date of his death, and not any future husband or wife. Hence, such a disposition does not restrain the power of alienation for a longer period than for two lives in being at the date of the death of the testator.³ A devise in trust until A. shall attain the age of twenty-one or shall die, and if he shall die before B. attains the age of twenty-one, then until B. shall attain that age or die, is valid. If A. should live to be twenty-one the estate would vest at once, and then the power of vesting is suspended only for his life. If he shall die after the date upon which B. attains his majority, the period of vesting is lengthened only by the lifetime of B. at the most. In neither case is the vesting postponed longer than two lives in being.⁴

§ 900. The statutory rule of perpetuities in Wisconsin.— In the state of Wisconsin the statute expressly provides⁵ that the absolute power of alienation of the fee shall not be sus-

¹ *In re Ricard's Estate*, 28 N. Y. S. 178, 19 N. E. R. 60. And see *Dean v. Mumford* (Mich.), 61 N. W. R. 7.

² *Brown v. Richter*, 76 Hun, 469, 27 N. Y. Supp. 1094.

⁴ *Cowen v. Rinaldo*, 28 N. Y. Supp. 369, 8 Misc. R. 115.

³ *Van Brunt v. Van Brunt*, 111 N. Y.

⁵ R. S. 1878, §§ 2038, 2039.

pendent "for a longer period than two lives in being at the creation of the estate."¹ Under this statute a devise to A. for life, remainder to his *then* living children, *i. e.*, living at his death, and in default of such to the *then* living heirs of the testator,² or to A. and B. jointly for life, remainder in fee to the survivor, and, on the death of the former under twenty-one years of age, to C. in fee,³ or to A. for his life, then to B. for his life, remainder in fee on the death of B. to his *then surviving* children,⁴ is valid, as the power of alienation in each of the above instances is not suspended for more than two lives in being at the death of the testator.⁵

§ 901. **The suspension of alienation for the purpose of accumulating income.**—Prior to the passage of the statute 39 and 40 George III., chapter 98, section 20, it was legally within the power of a testator to create a trust for the accumulation of income for the same period as was the measure of his power to direct a suspension of the absolute power of alienation. Thus, a fund might have been left in trust to accumulate the rents and profits of the same during the life or lives of any number of persons in being at the death of the testator and for the period of twenty-one years, and a possible period of gestation thereafter. The moving cause for the passage of the statute just mentioned was the legal controversy which arose upon the will of Mr. Thelluson, which is discussed in the notes. By that statute the settlement or the devise in trust of any and all real and personal property for the accumulation of the income thereof for any longer term than the life of the grantor, *or* than the term of twenty-one years from the death of the grantor or from the death of the testator, *or* than the minority of persons who shall be living or *en ventre sa mere*, or the minorities of persons who, under the trust, shall be entitled to the income which is directed to be accumulated, is invalid. In construing the English statute, the courts have held that an accumulation for twenty-one years after the death of the testator is valid only if the period immediately follows his death, so

¹ See *De Wolf v. Lawson*, 61 Wis. 474; *Scott v. West*, 63 Wis. 529, 575.

² *Saxton v. Webber*, 83 Wis. 617, 625, 53 N. W. R. 905.

³ *Hughes v. Hughes*, 91 Wis. 138, 142, 64 N. W. R. 851.

⁴ *Tyson v. Houghton* (Wis., 1897), 71 N. W. R. 94.

⁵ See also *Beurhaus v. Cole*, 94 Wis. 617, 627, 69 N. W. R. 986.

that if an accumulation is to commence at a date which is subsequent to the death of the testator, it will only be valid up to the end of the period of twenty-one years.¹

In many of the states of the American Union statutes which are similar in their provisions to the English statute have been passed. In New York, by statute,² the accumulation of income

¹ Shaw v. Rhodes, 1 My. & Cr. 154; Webb v. Webb, 2 Beav. 493.

The circumstances attendant upon the often-cited case of Thelluson v. Woodford, 4 Ves. 227, were as follows: Peter Thelluson died in the year 1797, leaving a will by which he devised his estate to trustees in fee to accumulate the income and re-invest the same during the lives of all the sons of the testator, and of all his grandsons born in his lifetime or then *en ventre sa mere*, and to receive the profits and to invest them from time to time in other real estate. The testator left him surviving three sons and four grandsons, and had twin sons posthumously born to him. There were thus in being at the death of the testator nine persons, several of them being infants in arms, during whose lives the income was to be accumulated. At and after the death of the survivor of all these persons the estate, with all the accumulations, was to be conveyed to the eldest living male descendant of each of the sons, and in default of a living male descendant of any son, then to the descendants of the other sons. The validity of the will was sustained by the court of chancery in 1798, and by the house of lords in 1805. The testator died in the year 1797 and left about half a million pounds sterling. If, as Chancellor Kent remarks, the period of accumulation should extend to one hundred years from that date, as it might well do in view of the infancy of the posthumous sons of the testator, and assuming that the final devisee was

under age when his share vested, the property would amount to upwards of one hundred million pounds sterling. "The testator's object," says Chancellor Kent, commenting upon this case, "was to protract the power of alienation by taking in lives of persons who were nominees without any corresponding interest. The property was thus tied up from alienation and from enjoyment for three generations; and when the period of distribution shall arrive, the accumulated increase of the estate will be enormous. This is the most extraordinary instance upon record of calculating and unfeeling pride and vanity in an ancestor, disregarding the ease and comfort of his immediate descendants for the miserable satisfaction of enjoying in anticipation the wealth and aggrandizement of a distant posterity. Such an iron-hearted scheme of settlement, by withdrawing property for so long a period from all the uses and purposes of social life, was intolerable. It gave occasion to the statute of 39 and 40 Geo. III., prohibiting any person from settling or devising real or personal property, for the purpose of accumulation, by means of rents or profits, for a longer period than the life of the grantor or testator, twenty-one years after his death, or during the minority of any person who, under the deed or will directing the accumulation, would, if then of full age, be entitled to the rents and profits." 4 Kent, Com., p. 280.

² 4 Rev. St. (8th ed.), pp. 2434, 2435, §§ 37, 38, and p. 2516, §§ 3, 4

except for the benefit of minors in being, and during the period of their minority, is expressly forbidden. Under this statute a trust requiring an accumulation for a definite term of years,¹ or during a life in being,² or during an indefinite period, as, for example, until the accumulations amount to sufficient for a particular purpose,³ is invalid. Every provision for an accumulation which is for a period which is not measured by the minority of some person who is in being at the death of the testator is invalid in the state of New York.⁴ But in that state it has also been held that the accumulation, though it may be directed for a longer period than a minority, will be good at least for the minority of the minor for whose benefit the accumulation has been directed.⁵ So, where a trust for an illegal accumulation has been framed, the amount accumulated under it devolves upon that person who is next eventually entitled under the will.⁶ In the state of Pennsylvania the statute⁷ provides that no settlement or appointment by any device whatever for the accumulation of the profits of real or personal property, except for charitable or religious purposes, shall be allowed for a longer period than the life or lives of the one or more persons making it, and twenty-one years from their respective deaths, with an allowance in case of a possible term of gestation.⁸ Under this statute it does not seem necessary that the object of the accumulation shall be to benefit the minor. An accumulation for any purpose is valid, provided the period in which it takes place does not exceed the period of twenty-one years after the death of the testator. The object of the statute is to prevent a permanent accumulation by which the property accumulated may be permanently taken out of the market. A mere temporary accumulation of the surplus income which may arise after the support of a legatee is provided

¹ *Tucker v. Tucker*, 5 N. Y. 408.

² *In re Roos' Estate*, 4 Misc. R. 282, 24 N. Y. S. 862.

³ *Wells v. Wells*, 24 N. Y. S. 874, 30 Abb. N. C. 225; *In re Hoyt's Estate*, 24 N. Y. 577, 71 Hun, 13.

⁴ *Harris v. Clark*, 7 N. Y. 242; *Manice v. Manice*, 43 N. Y. 303; *Hawley v. James*, 5 Paige (N. Y.), 318.

⁵ *Gilman v. Reddington*, 24 N. Y. 9; *Hull v. Hull*, 25 N. Y. 647.

⁶ *Cochrane v. Schell*, 85 N. E. R. 971, 140 N. Y. 516; *Smith v. Parsons*, 146 N. Y. 116, 40 N. E. R. 736.

⁷ Act Leg. Pa., 1853, P. L. 503; and see also Act May 9, 1889, P. L. 173; *Purdon's Dig.*, p. 2450.

⁸ As to charitable gifts see *In re Lennig's Estate*, 154 Pa. St. 209, 25 Atl. R. 1049.

for, which surplus is to be applied for his benefit as he may need it, is not prohibited by the statute.¹ Accumulations for charitable purposes constitute an exception to the rules discussed in this section, and these we will discuss in the next section.

§ 902. The validity of accumulations for a charity.—The rule which limits the accumulation of income to a fixed period which is measured by a life or lives in being, or by minorities, is not applicable to accumulations of income which are directed to provide for charities. Assuming that the law restricting the suspension of the alienation of property does *not* apply to a devise of the fee outright, the income to be *at once given to the poor or the needy*, or to other charitable purposes, no valid reason exists why a testator, who may not leave enough property at his death to carry out fully his charitable intentions, may not provide that the income of what he can then give shall accumulate indefinitely until sufficient is realized. A gift to a charitable institution which is to be incorporated subsequently to the death of the testator² is almost universally valid. And it is submitted that a gift to accumulate for a charity is not to be overthrown merely because the whole amount necessary is not given in the aggregate, but a small sum is given with a direction that it shall accumulate until with the interest and income it is sufficiently large for the purpose.

In the case of Downing college at Oxford a gift to purchase ground and build a college was sustained, though, because of the peculiar circumstances of the case, the trust was not carried out until fifty years after the death of the testator.³ So, too, in an early American case a fund was given in trust to accumulate until sufficiently large to support fifty sailors in a hospital. The United States supreme court sustained the gift, and an institution was incorporated, which at the present time, by reason of the immense advance in the value of the land devised, supports in great comfort nearly one thousand aged sailors.⁴

¹In *re* Hibb's Estate, 143 Pa. St. 217, 29 W. N. C. 19, 22 Atl. R. 882; In *re* Williamson's Estate, 22 Atl. R. 83, 143 Pa. St. 150, 28 W. N. C. 353.

²*Ante*, § 829.

³*Attorney-General v. Downing*, Wilmot, 13, Dick. 414, Amb. 550, 571.

⁴*Inglis v. Sailors' Snug Harbor*, 3 Peters, 99.

An explicit direction that the income of a sum of money shall accumulate for a specified number of years, and at the end of that period shall be given to a charity, is therefore valid.¹ A direction that a fund and its income shall accumulate indefinitely for a charity is valid,² though the limits of the period of accumulation are subject to the control and jurisdiction of a court of equity, which may terminate the accumulation of income if it has been going on for an unreasonable time.³ For, though equity will not usually interfere where a definite period is fixed during which the income is to accumulate, or where the trustees have an uncontrollable discretion to determine whether sufficient income has accumulated or not, still if, by reason of the rapid increase in value of the property in trust and the negligence of the trustees in expending the income as directed, the fund is increasing at an exceedingly rapid rate, a court of equity will order the application of principal and income to the charitable purpose indicated, or to some other purpose *cy pres*.⁴

¹ *Brown v. Yeall*, 7 Ves. 50, n., cited in 9 Ves. 403, 406, 10 Ves. 27, 584; *Northampton v. Smith*, 11 Met. (Mass.) 390 (accumulation for sixty years); *Woodruff v. Marsh*, 63 Conn. 125, 26 Atl. R. 846 (one hundred years). A direction in the will of Benjamin Franklin that the income of a fund devised therein should accumulate, and at the end of one hundred years should be given to the city of Philadelphia for public works, was sustained in *Franklin's Adm'r v. City of Philadelphia*, 13 Pa. Co. Ct. R. 241, 2 Pa. Dist. Ct. R. 435, 9 Pa. Co. Ct. R. 484.

² *Ingraham v. Ingraham*, 169 Ill. 432, 451, 48 N. E. R. 561; *In re Lennig's Estate*, 154 Pa. St. 209, 25 Atl. R. 1040; *Whitman v. Lex*, 17 S. & R. (Pa.) 91; *Philadelphia v. Girard*, 45 Pa. St. 1; *Odell v. Odell*, 10 Allen (Mass.), 1, 6, 7, 13 et seq.; *Harbin v. Masterman*, 7 Rep. 159, (1894) 2 Ch. 184, L. R. 12 Eq. 559; *Talbot v. Jevvers*, L. R. 20 Eq. 355; *Roger's Estate*, 179 Pa. St. 609, 36 Atl. R. 340.

³ *Wardens of St. Paul's Church v. Attorney-General*, 164 Mass. 188, 41 N. E. R. 231; *Woodruff v. Marsh*, *supra*.

⁴ *American Academy v. Harvard College*, 12 Gray (Mass.), 582; *Hawes v. Humphrey*, 9 Pick. (Mass.) 850, 355, 362; *Hawes Place Con. Soc. v. Hawes Fund*, 5 Cush. (Mass.) 454. If the accumulations are to cease during the life of a person in being or at his death, no question of a perpetuity can be raised. *Ingraham v. Ingraham*, 169 Ill. 432, 450, 48 N. E. R. 561. A devise in trust for a charitable purpose, to take effect when a sufficient amount shall have been subscribed by the general public, is not void as a perpetuity; nor is it too vague. A reasonable time will be allowed for the subscription, to be determined on all the circumstances by a court of equity as having jurisdiction of trusts and charities, as the performance of this condition is precedent to the absolute vesting of the executory gift. *Almy v. Jones*,

17 R. I. 265, 21 Atl. R. 616. A provision that income shall be accumulated, and that half shall be paid to charities and the other half to A. and his heirs, though valid as to the charities is void as to the individuals; but, as it is severable, it may be sustained as to the former, while overthrown as to the latter. *Wardens of St. Paul's Church v. Attorney-General*, 164 Mass. 188. 41 N. E. R. 231; *Harbin v. Masterman*, 7 Rep. 159, (1894) 2 Ch. 184. "We are not prepared to say that accumulation for a charitable purpose can in no case be allowed for a fixed period of more than twenty-one years, or for a contingent period beyond a life or lives in being and twenty-one years afterwards. The uncertain duration of a life or lives in being would seem to have no relation to a charity. And the justice or policy of a rule is not apparent, which would prevent a person charitably disposed, but

whose property is not large enough to carry out his charitable intent by an accumulation of twenty-one years, from founding a charity, except through the indirect measure of a life or lives in being; especially when the period of accumulation which he needs or selects is one within the average duration of accumulation under the common rule. The objection that accumulations for a charitable purpose might go on indefinitely, unless governed by the common rule, would certainly be entitled to grave consideration before determining what the limit is. It is possible that the power of a court of chancery over charities might enable it to so modify the donor's particular directions as to carry out his general charitable intention without violating any rule of public policy." *Odell v. Odell*, 10 Allen (Mass.), 1, p. 18.

CHAPTER XLV.

THE UNCERTAINTY OF THE LANGUAGE AND THE ADMISSIBILITY OF PAROL EVIDENCE

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| <p>§ 903. The uncertainty of testamentary dispositions — The degree of certainty required.</p> <p>904. The invalidity of a bequest or a devise of an indefinite amount or quantity.</p> <p>905. Gifts which are void because of an uncertainty of the beneficiary.</p> <p>906. When a gift of what may remain after a void gift is invalid for uncertainty of amount.</p> <p>907. Construction of gifts to be enjoyed by several in succession.</p> <p>908. Parol evidence of the actual intention of the testator not contained in the will is inadmissible if introduced</p> | <p>solely for the purpose of influencing the construction of the testator's language.</p> <p>§ 909. Parol evidence to show the circumstances of the testator.</p> <p>910. Patent and latent ambiguities defined — The admissibility of parol evidence to explain latent ambiguities.</p> <p>911. The admissibility of parol evidence to identify the subject-matter of a legacy.</p> <p>912. Parol evidence to show mistakes and supply omissions.</p> <p>913. Parol evidence to explain the meaning of words.</p> <p>914. The uncertainty of terms descriptive of real property.</p> |
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§ 903. The uncertainty of testamentary dispositions — The degree of certainty required.— The informal or formless character of the language of a will, its lack of verbal precision and perspicuity, and the fact that the testator, either because of ignorance or haste, has paid little or no attention to the rules of grammar or literary composition, are not, *per se*, valid objections to it. The law does not permit the ignorance of the testator, or his inability to use language correctly, to defeat his will. It overlooks grammatical and orthographical errors, mistakes in punctuation,¹ and the rude and uncouth style in which his intention is stated, if *that* can be ascertained. Courts of construction ought to favor the wills of testators who, though perhaps mentally unfitted for the task, have, without professional assistance, attempted to make their own wills. Be the language

¹ *Ante*, § 369.

of the will ever so perplexing, elliptical and vague, the court must, with patience, construe it, accepting all the light which may be gained from the context and from evidence of surrounding circumstances.¹ The testator may, with safety, be presumed to have had *some* intention in mind as regards the disposition of his property *when writing his will*. And it may also be assumed that the testator did not desire to die intestate or he would *not have made any will at all*. The court may mould the language of the will by omitting,² transposing³ or supplying words,⁴ where this is possible by referring to the context. And, if by this means or by means of parol evidence, it is possible to give an intelligible meaning to the language of the will, the court ought to give it that meaning. It must be an extreme case in which a court can relieve itself from the responsibility of construing a will by declaring it to be void for uncertainty. For testamentary language ought to be declared void for uncertainty, only when from the whole will, with all admissible parol evidence, it is mere conjecture to say what the testator means by the words that he has used.

The fact that the testator uses language which is susceptible of *more than one meaning* ought not to deter the court from placing a meaning upon his language, though all the significations which are attached to the language are diverse. In the interpretation and construction of wills the precise and literal meaning of words is not always to be adhered to. The court must from the *whole will try to ascertain*, not what the language *ought to mean*, but what the testator has employed it to mean in the particular will. But where for any reason the provisions of a will considered in its entirety are so obscure that, with all the light of extraneous circumstances, no definite idea can be formed of the intention of the testator, its provisions, so far as they are obscure, are void for uncertainty.⁵ This is a last resort, and it should be avoided until the confines of legitimate construction have been reached, and to proceed farther would be to enter upon the realm of conjecture. Though it is allowable to invoke every means of finding the

¹ *Post*, § 909.

² *Ante*, § 361.

³ *Ante*, §§ 362, 363.

⁴ *Ante*, §§ 363, 368.

⁵ *Cope v. Cope*, 45 Ohio St. 464, 15 N. E. R. 206; *Rothmaler v. Meyers*, 4 Des. (S. C.) 215.

intention, it cannot be permitted to guess at the intention; for it should be remembered that, though the law will foster and protect the statutory right of the testator to make a will, and the vested interests of the beneficiaries under it, it will none the less sedulously defend the rights of those who would take the property in case of intestacy. Thus, it has become a maxim in the construction of wills that the heir is not to be disinherited unless by express words or necessary implication. And in modern times and in the American courts the same protection is thrown around the rights of those who take personal property under the statute of distribution.¹

§ 904. The invalidity of a bequest or a devise of an indefinite amount or quantity.—A testamentary gift of an indefinite amount of money or of an indefinite quantity of land is void for incurable uncertainty when neither upon the face of the will, nor by the aid of admissible parol evidence, can it be ascertained how much land or money the testator intended to

¹ *Dunlap's Appeal*, 116 Pa. St. 500, 9 Atl. R. 936. "We ought not, without absolute necessity, to let ourselves embrace the alternative of holding a devise void for uncertainty. Where it is possible to give a meaning we should give it, that the will of the testator may be operative; and where two or more meanings are presented for consideration, we must be well assured that there is no sort of argument in favor of one view rather than the other before we reject the whole. It is true the heir at law shall only be disinherited by clear intention; but if there be ever so little reason in favor of one construction of a devise rather than any other, we are at least surer that this is nearer the intention of the testator than that the whole should be void and the heir let in. The cases where courts have refused to give a devise any effect on the ground of uncertainty are those where it was quite impossible to say what was intended or where no intention at all had been expressed, rather than cases where several meanings had been suggested

and seemed equally entitled to the preference. On this head it may be further observed that the difficulty of arriving at a conclusion—even the grave doubt which may hang around it—certainly the diversity and the conflict of opinions respecting it, and the circumstances of different persons having attached different meanings to the same words, form no ground whatever of holding a devise void for uncertainty. The difficulty must be so great that it amounts to an impossibility; the doubt so great that there is not an inclination of the scales one way, before we are entitled to adopt the conclusion. Nor have we any right to regard the discrepancy of opinion as any evidence of uncertainty, while there remains any reasonable ground of preferring one solution to all the rest. The books are full of cases where every shift, if I may so speak, has been resorted to rather than hold the gift void for uncertainty." By Lord Brougham in *Doe d. Winter v. Perratt*, 6 M. & G. 859.

give. Where the testator directed that a person whom he names should "*share in his estate*," not stating how much he should receive as a share;¹ that A. should be "provided with a home;"² or where he devised to A. "*a small piece of land*;"³ or gave to B. "*some of his best linens*;"⁴ or directed his executor to "purchase for C. *some land* at a price not to exceed \$—,"⁵ the legacy or direction was held void because of its uncertainty as to the amount. But a direction that A. shall have power "to appropriate to herself absolutely such parts of the plate as she may wish" is not void as uncertain, for it is an absolute gift to A. of all the testator's plate.⁶

Where the amount of a pecuniary legacy or the quantity of land devised is capable of ascertainment, either from a perusal of the will by the court or by extrinsic evidence, the will must be sustained. This rule of construction is frequently applied to a direction for the support of a legatee by the executor out of the income of a fund in trust, where the precise amount of the income which is to be used for this purpose is not mentioned. The trustee will be required in this case, if he has *no discretion expressly conferred* upon him, to furnish the beneficiary with a support and education commensurate with the income of the amount in trust for the purpose according to the social condition of the beneficiary. If the trustee has a discretion to fix the amount to be paid for support, he must exercise it in good faith according to the language of the will and the facts of the case; and, if he does not do this, a court of equity may intervene, and, either by construing the will or by other means, find out how much is required to carry out the inten-

¹ *Ante*, § 320.

² *Ante*, § 318.

³ *Weatherhead v. Sewell*, 9 *Humph.* (Tenn.) 272.

⁴ *Peck v. Halsey*, 2 *P. W.* 387.

⁵ *In re Traylor's Estate*, 81 *Cal.* 9, 22 *Pac. R.* 297.

⁶ *Arthur v. McKinnon*, *L. R.* 11 *Ch. D.* 385, *W. N.* (1879), p. 93; *Kennedy v. Kennedy*, 10 *Hare*, 435. A bequest of "*one mortgage*" entitles the legatee to select one out of several mortgages owned by the testator at his

death. *Johnson v. Goss*, 138 *Mass.* 433, 435. See further as to the power of a legatee to select, *Hobson v. Blackburn*, 1 *My. & K.* 574; *Jacques v. Chambers*, 2 *Coll.* 441, 453; *Millard v. Bailey*, *L. R.* 1 *Eq.* 378. "Unto my all my just debts and demands all my funeral and burying costs first balance to S. K. my brother my mother and J. M. to have their maintenance and burying charges out of it," is void for uncertainty. *Kelly v. Kelly*, 25 *Pa. St.* 460.

tion of the testator regarding the character of the support which is to be furnished.¹

On the other hand, a legacy of the "*same amount* as had been given in the will of A.,"² a direction to spend income for the purpose of giving a legatee a "liberal education,"³ a legacy of a *sum equivalent to the rent* of a certain piece of land,⁴ or of an amount which is to be determined by the number of shares into which a residue is to be divided, or a direction to executors that they shall retain out of the estate a "reasonable sum to remunerate them for their trouble,"⁵ or a legacy of "£3,000 or thereabouts,"⁶ is not uncertain, for in each and all of these cases the amount can be positively and definitely ascertained, either by a reference to the will itself or to competent written evidence. So a direction to a trustee to pay "taxes and legal assessments" out of the income, to "keep premises in repair, and to pay the balance of the income to A.," is not void for uncertainty, for it is easy for the trustee to approximate how much will be required for the purposes mentioned, and, if more than enough is reserved for taxes, repairs, etc., the surplus may be included in the next payment of income to the beneficiary.⁷

¹ *Forbes v. Darling*, 94 Mich. 621, 54 N. W. R. 621; *Conover v. Fisher* (N. J. Eq., 1898), 36 Atl. R. 948; *McKenzie v. McKenzie*, 145 Mass. 577, 15 N. E. R. 88; *In re Keinz's Estate*, 88 Hun, 298, 84 N. Y. S. 339; *Collister v. Fassitt*, 48 N. Y. S. 792; *Pride v. Fooks*, 2 Beav. 430, 437. *In Broad v. Bevan*, 1 Russ. 511, the legatee was commanded "to provide for the daughter of the testator during her life," and the court of chancery fixed the amount which was to be devoted to this purpose. Where a will directs that a "liberal support" shall be furnished, the court, on reviewing the facts, and considering the amount of the income and the value of the estate, may determine what a "liberal support" is. *McLean v. Thomas*, 159 Ill. 227, 42 N. E. R. 788. See also *Cresap v. Cresap*, 34 W. Va. 310, 12 S. E. R. 327.

² *Stevens v. Powys*, 1 De Gex & J. 24, 32.

³ *In re Atwood's Estate*, 32 N. Y. Supp. 115, 10 Misc. R. 480.

⁴ *Rush v. Couchman*, 92 Ky. 339, 17 S. W. R. 1020.

⁵ *Jackson v. Hamilton*, 3 Jo. & Lat. 702.

⁶ *Oddie v. Brown*, 4 De Gex & Jo. 179.

⁷ *In re Wordin's Estate*, 64 Conn. 40, 29 Atl. R. 238. A testator gave A. the "use and control of the two east rooms of his house, and a horse and buggy, and if the horse shall die the executors to buy another for her," and directed the executors "to give A. a decent support during her natural life." The provisions as to the horse and the "decent support" were certainly extremely indefinite. The court held that A. was entitled to medical attendance and other ex-

A legacy of an amount differently stated will be construed most favorably to the legatee. Thus, he will take the largest sum where the legacy is of an amount "not exceeding \$100,"¹ or "of \$50 or \$100."² And where the amount of a legacy is expressed by the dollar sign, followed by the figure 5, and this is followed by two ciphers connected together, with a distinct space but no decimal point between the figure and the ciphers, the ciphers being also written somewhat above the line, an ambiguity exists which permits the introduction of parol evidence to aid in determining whether \$5.00 or \$500 was meant by the testator.³

§ 905. Gifts which are void because of the uncertainty of the beneficiary.—If the court cannot, from a study of the context of the will, or by parol evidence, *identify* the persons intended to be benefited, so that it is utterly impossible to ascertain who is meant to take, the will must be *to that extent void for uncertainty*, and the testator is intestate.

A legacy to "*one of the sons of A.*," who has several sons at the date of the execution of the will,⁴ or to the children of "*a deceased son of A.*," who had three deceased sons at the date of the will, all of whom left children,⁵ is void for the obvious reason that no court can tell which son is meant.⁶ But a devise to "*one of the sons of A. who shall take care of B.*" is not void for uncertainty, for the gift is readily made certain by the performance by a son of A. of the condition precedent upon which it is given.⁷ This rule applies to a legacy "to one of A.'s daughters that shall marry a Norton," which means the daughter of A. that shall first marry a Norton.⁸

Gifts to indefinite and fluctuating classes are not necessarily void, though the gifts are not *per se* charitable, where it can

penses attendant upon her illness, and that, if the horse was sold by the executors to meet these expenses, the executors should purchase another for A. The legatee was not compelled to remain in the rooms set apart for her, and might demand a decent support, though she should reside elsewhere. *Hart v. Hart*, 81 Ga. 785, 8 S. E. R. 182.

¹ *Thompson v. Thompson*, 1 Coll. 395.

² *Seale v. Seale*, 1 P. W. 290.

³ *Schlottman v. Hoffman* (Miss., 1896), 18 S. R. 893.

⁴ *Strode v. Russell*, 2 Vern. (1708), 621, 624; *McDermott v. Insurance Co.*, 3 Serg. & R. (Pa.) 607.

⁵ *In re Stephenson*, 66 L. J. Ch. 93, 1 Ch. (1897), 75, 75 L. T. 495.

⁶ See *Dowset v. Sweet*, Amb. 175.

⁷ *Whitesides v. Whitesides*, 28 S. C. 325, 331, 5 S. E. R. 816.

⁸ *Bate v. Amherst*, T. Raym. 82.

be ascertained by parol who are the members of the class. Gifts to the relatives of the testator or to members of his family are valid.¹ But a devise to "my brother's and sister's families" is void because it is impossible to ascertain, where the testator has several brothers and sisters, which of them was meant.² A gift to a class described by words referring to another part of the will, in which they are *not* mentioned, is not thereby void, as the words of reference may be rejected. Thus, legacies "to my nephews and nieces *aforesaid*,"³ "to my said children *last mentioned*,"⁴ or to "*such* children of A." upon his death,⁵ are valid, although the members of the class were not mentioned in any way in another portion of the will.⁶ All nephews or children take as members of the class. So, too, a legacy to a class, excepting one member who is not named, goes to all the class.⁷ A devise to A. *or* to B., in the *alternative*, may be void for uncertainty, unless it shall appear that A. and B. are to take *in succession*, or that "*or*" should be read "*and*," in which latter case they take as co-tenants. Thus, a devise of land "to the heirs male of any of my sons *or* next of kin" was regarded as of doubtful validity, for it is impossible to tell whether the testator meant the heirs male of one of his sons or of all of them, or the heirs male of his next of kin.⁸ So, too, a devise to "A., who resided at B. when I left Eng-

¹ *Ante*, § 585.

² *Doe d. Hayter v. Joinville*, 3 East, 172, 176 (1802). See *ante*, § 585. Under the following provisions for families it was held that the testator meant the children of the sister named to participate, that he also meant to group the legatees in families, and that the legatees took *per stirpes*. "The other half of R., and a claim I have against the government of the United States, I think is about one hundred thousand dollars. These two amounts, or halves, I intend to give to the families of my brother Thomas H. Allen's four children . . . and to the five children of my sister Cynthia A. Smith." *Succession of Allen*, 20 S. R. 193, 48 La. Ann. 1036.

³ *Campbell v. Bouskell*, 27 Beav. 325, 329.

⁴ *Hall v. Hall*, 128 Mass. 120, 124.

⁵ *Hope v. Potter*, 3 K. & J. 206.

⁶ A devise to the "said last mentioned A., B., C. and D." does not constitute a devise to D., who was not mentioned in any part of the will. *Hyatt v. Pugsley*, 23 Barb. (N. Y.) 285.

⁷ The appointment of "*one* of my sisters to be my executrix," the testator having three sisters living at the date of the will (*In re Blackwell*, L. R. 1877, P. D. 72), or of "*any two* of my sons to be executors," is invalid (*In re Baylis*, 2 Sw. & Tr. 613, 614) as incurably uncertain. A devise to A., B. and C. as individuals, but "*one* to be the heir of the others," is uncertain and void. *Wood v. Ingersole*, 1 Bulstr. 61, Cro. Jac. 260.

⁸ *Beal v. Wyman*, Styles, 240.

land, *or* to his heirs, executors or assigns," was held void where A. died in the life-time of the testator, the words being altogether too uncertain to show that the testator intended the heirs to take by substitution.¹ Whether a gift in the alternative to the "heirs *or* next of kin of A." is void for the uncertainty of the persons who are to take, has been differently determined. In an early case² such a gift was held void, for in England the person who takes the real estate as heir is almost always a different person from those who take the personal property under the statute of distribution. On the other hand, a gift of *personal estate* to the "heirs *or* next of kin" of a person who was described by the testator in the will as deceased was held to indicate the statutory next of kin.³

Some uncertainty may arise from a loose employment of the words "named" or "mentioned." To name means almost always to be mentioned by name. But where a testator directed that a surplus is to be divided among the legatees "hereinbefore named," and, if there was a deficiency, a deduction should be made from the shares of all the legatees named, the direction is applicable not only to legatees who are mentioned by their Christian names or by their surnames, but also to those who take as members of classes, as heirs and next of kin.⁴ So a gift to persons "*heretofore named*" may mean and include persons mentioned by some designation other than their Christian name and surname, if such clearly be the intent of the testator.⁵ Where the testator gave a legacy to his relations "*hereafter mentioned*," and omitted to mention any in the will, the claims of his next of kin to legacies were not allowed.⁶ "*Hereinbefore named*" usually means named as a legatee. But where the testator gave a legacy of one dollar to A. and B., children of my brother C., and the remainder to the "*heirs of the testator not before named*," the brother C. was included

¹ White v. Templar, 2 Sim. 524.

² Lowndes v. Stone, 4 Ves. 648, 650.

³ In re Thompson, L. R. 9 Ch. D. 607, 609, 2 Kee. & J. 735. And in one case a gift to A. *or* her children was read to "A. *and* her children," and the gift held certain and valid, the devisees taking as a class. Eccard v. Brooke, 2 Cox, 213. A gift to per-

sons in hospitals of *or* in the city of Canterbury was held void upon the principles stated in the text. Flint v. Warren, 15 Sim. 626, 629.

⁴ Ruggles v. Randall (Conn., 1897), 38 Atl. R. 885, 888.

⁵ Seale-Hayne v. Jodrell, 61 L. J. Ch. 70, 72; (1891) Ch. 304.

⁶ Crampton v. Wise, 58 L. T. 713.

among the legatees not before named. The naming of C. was merely to identify his children, and, where C. died after his legacy vested, his heirs were permitted to take by descent from him, including the two children A. and B. to whom merely nominal gifts had been given.¹

§ 906. When a gift of what may remain after a void gift is invalid for uncertainty of amount.—A legacy of the residue, or of what remains after another legacy is paid, the amount of which latter is to be determined by the trustees of the fund, by executors, or by the circumstances of the case, may fail for uncertainty because of the failure of the first legacy. If the testator has not pointed out how much is to be included in the first legacy, and it fails because its object is illegal as well as its amount indefinite, there is no way open for a proper ascertainment of the amount of the probable surplus. In strictness of language, when the first legacy fails there is then no surplus. So a gift of a sum of money in trust for the purpose of erecting or purchasing a chapel, and, *if any surplus remains, then to pay it to A.*, was held void *in toto* by the court, because the direction as regards the chapel was in contravention of the statute of mortmain; and, this legacy failing, no surplus existed, as it could not be inquired into by the court how much the testator wished his trustees to expend for the chapel, which would be necessary in order to ascertain the amount of the probable surplus which the other legatee was to take.²

¹ Klein v. Faulstich, 154 Pa. St. 188, 26 Atl. R. 218. A clause directing the disposition of property "*hereinbefore given*" cannot apply to property given by subsequent clauses. Reid v. Walbach, 75 Md. 205, 23 Atl. R. 472.

² Chapman v. Brown, 6 Ves. 404, 410. The court said that it was impossible "to frame any direction that would enable the master to form any idea as to what would have been proper to expend upon the chapel. If the testatrix had pointed out any particular place, *that* might have furnished some ground of inquiry as to what size would be sufficient for

the congregation to be expected therein, but the gift in question was so entirely indefinite it was quite uncertain what the residue would have been." See also the nearly similar case of Attorney-General v. Hinxman, 2 Jac. & Wal. 272. The rule in the text has been applied in England to that class of cases in which the testator has directed the trustees of a fund devised in perpetuity to erect a monument for himself and family, or to keep his grave in repair, which is void as not being for a public charitable purpose and a disposition of the surplus to others. See cases cited *ante*, § 823.

This would be the rule where the terms of the void devise are so extremely vague that it is practically impossible to learn, even approximately, how much the testator wished to devote to the carrying out of the void purpose, provided it had been valid. But, on the other hand, if the expression of the intention of the testator regarding the sum of money which is to be expended upon the object which ultimately proves illegal is clear, or if it can be made clear by a reference or other judicial inquiry involving the taking of evidence, or if from the terms of the will itself the court is able to ascertain the amount which would have been expended if the purpose had been a legal one, the amount of the surplus, having thus been made certain, should be paid.¹ But this rule, though commending itself to reason as best adapted to carry out the testator's intention, has not met with universal acceptance in the English cases in which the question of the disposition of a surplus to arise after a void and indefinite gift has failed has been discussed. In cases where the courts might very easily, because of the nature of the disposition made and the property disposed of, have ascertained the amount of the surplus, they have refused to do so; but where the first gift was illegal or invalid for any reason whatever, they have held that the whole fund shall be paid to the legatee to whom, in the first instance, the surplus had been given, wholly discharged of the void purpose.² In most cases such a new disposition of the whole fund in favor of the person to whom *only the surplus* had originally been given is directly contrary to the intention of the testator. If the general residue is *partially devised for a purpose which fails*, and the surplus of that residue is given to A., it may be consistent with the intention of the testator to give A. the whole general residue, including the void legacy, as the word "residue" comprises everything ineffectually disposed of by the will.

¹ *Mitford v. Reynolds*, 1 Phil. 185, 199, 706. If the testator has indicated the *precise sum* he wishes given for the illegal purpose, there can, of course, be no difficulty whatever in ascertaining the surplus. If he has stated the particular piece of land which he desires to have purchased, and has also given instructions as to

its use which are reasonably definite in so far as they entail an expenditure of money, the surplus can readily be ascertained by an inquiry.

² *Fisk v. Attorney-General*, L. R. 4 Eq. 521; *In re Birkett*, L. R. 9 Ch. Div. 576; *In re Williams*, L. R. 5 Ch. Div. 735.

But where the testator gives a general pecuniary legacy in part for an illegal purpose, and the surplus to A. after the illegal purpose shall have been accomplished, it is nullifying his intention to give A. the entire legacy, when, if the particular purpose had been valid, he would have received very much less, and perhaps nothing at all in case its execution had exhausted the legacy.¹ If the amount for the invalid purpose is not ascertainable, so that no surplus arises, the whole legacy should fail and go to the residuary legatee. It is absurd to assume that, because the testator intended A. to share in it more or less according to circumstances if the particular purpose had been valid, he meant him to take the whole of it in case the purpose for whose execution no sum is stated should be impossible of accomplishment.

§ 907. Construction of gifts to be enjoyed by several in succession.—An objection, based upon the indefinite and uncertain character of the language, may be raised in the case of a gift to several persons, to be by them enjoyed in succession.

If the legacy or devise is to several individuals specifically designated by name or otherwise, each to have a life estate, whether expressly or by necessary implication, as “to A., B., and C., for the life of each,” the obvious solution of the difficulty, and one which approaches most closely to the probable intention of the testator, is for the several beneficiaries to take estates for life in order of time as their names are written in the will by the testator.

But where the property is given to a class, or to an individual named, and *also* to a class of which he is a member, to be enjoyed in succession by all the members of the class, the order of succession is to be determined by seniority of age; at least in the case of gifts to sons, children or brothers as classes. So, where the provision was for A. and his brothers successively, and A. *was the oldest son and heir*, the court held he should take first in order of time, and after him his brothers according to their age.² Such a mode of disposition, made in

¹ *Fisk v. Attorney-General, supra.* to institute an inquiry, but gave the whole sum to A. discharged of the invalid legacy. But compare *contra*, *In re Birkett, supra*, and *Dawson v. Small*, L. R. 18 Eq. 14, were devises of a specific sum in part for an invalid purpose and the surplus to A., and in each case the court declined to institute an inquiry, but gave the whole sum to A. discharged of the invalid legacy. But compare *contra*, *Fowler v. Fowler*, 33 Beav. 616.

² *Ongley v. Peale*, 2 Lord Raymond, 1312.

order to avoid an invalid devise because of uncertainty, may appropriately be made in England, where the rule of primogeniture is established, though a similar devise would perhaps be void in the United States. But, on the other hand, a devise to A. for life, then to B. for life, and then to the next heir of the testator in succession for his life, was held void as to all life estates coming after B.'s.¹

§ 908. Parol evidence of the actual intention of the testator not contained in the will is inadmissible, if introduced solely for the purpose of influencing the construction of the testator's language.—The statute requires all wills, with immaterial exceptions, to be in writing. As the statute imperatively requires the intentions of the testator to be in writing, we cannot receive evidence which is extrinsic to the writing to contradict, vary, supplement or enlarge the signification of the written language which the testator used. The testator will, unless a contrary presumption is created by the context, be presumed to have used the words in which he expresses himself in his will in their strict and primary sense and application. If, on comparing the language of the will with the extrinsic circumstances of the person and property of the testator, which the court always has the right to inquire into, it shall appear that the words of the testator have an intelligent meaning and express an intention which can be carried out, it is not permissible to receive parol evidence to show that they possess some other and a different meaning. The testamentary intentions of the testator must be learned in all cases from the will itself. And though the exclusion of parol evidence of the intention of the testator is rather more rigid at the present day than in earlier times, the rule of exclusion is very old, having an origin contemporaneous with the introduction of written wills, and being in the first instance intended for the suppression of perjury and the prevention of fraud.²

¹ *Thomason v. Moses*, 5 Beav. 77.

² *Stratton v. Morgan* (Cal., 1896), 44 Pac. R. 1028; *Spalding v. Huntington*, 1 Day (Conn., 1802), 8; *Avery v. Chappell*, 6 Conn. (1826), 270; *Canfield v. Bostwick*, 21 Conn. 550 (1851); *Thweatt v. Redd*, 50 Ga. (1873), 181; *Richards v. Miller*, 62 Ill. 417 (1871);

Bevelot v. Lestrade, 153 Ill. 625, 38 N.

W. R. 1056; *Heslop v. Gatton* (1873), 71 Ill. 528; *Brownfield v. Winslow*, 78 Ill. 467; *Pocock v. Reddinger*, 108 Ind. 573, 575 (1886); *Daugherty v. Rogers*, 119 Ind. (1889), 254, 257; *Huston v. Huston*, 36 Iowa, 667 (1885); *Muir v. Miller*, 72 Iowa (1887), 585,

§ 909. **Parol evidence to show the circumstances of the testator.**—On reading a will it will invariably be found that it contains in almost every clause, if not in every line or sentence, references, either express or by implication, to extrinsic circumstances. The testator refers to his property by words of specific description, as “my house on Broadway,” or he refers to certain persons specifically, naming them as beneficiaries, or to members of his family individually or as classes, as, for example, his heirs or children. Aside from any question of intention, and be the meaning of the testator ever so clear, it is very evident that, before we can adequately understand his will, we must know something of the circumstances by which

589, 34 N. W. R. 429; Long v. Duvall, 6 B. Mon. (45 Ky., 1846), 219; Stephen v. Walker, 8 id. (47 Ky.) 600; Caldwell v. Caldwell, 7 Bush (Ky.), 516; McCauley v. Buckner, 87 Ky. 191, 8 S. W. R. 196; Morvant's Succession, 45 La. Ann. 207, 12 S. R. 349; Jones v. McClellan, 76 Me. 49; Walston v. White, 5 Md. 297 (1853); Watson v. Boylston, 5 Mass. 417; Weston v. Foster, 7 Met. (48 Mass., 1844), 297, 299; Tucker v. Seamen's Aid Society, 7 Met. (48 Mass.) 188; Denfield's Petition, 156 Mass. (1893), 265, 266; Foster v. Smith, 156 Mass. 379, 385; Crocker v. Crocker, 11 Pick. (Mass.) 252; Forbes v. Darling, 94 Mich. 621 (1893), 54 N. W. R. 385; Bradley v. Bradley, 24 Mo. 311; Johnson v. Johnson, 18 N. H. 594; Brown v. Brown, 43 N. H. 17; Nevius v. Martin, 30 N. J. Law, 465; In re Gordon's Will, 50 N. J. Eq. 397, 26 Atl. R. 268; Heater v. Van Auken, 14 N. J. Eq. 160; Cleveland v. Havens, 13 N. J. Eq. 101; Brearly v. Brearly, 9 N. J. Eq. 21; Bradhurst v. Field, 63 Hun, 633, 18 N. Y. S. 535; Arcularius v. Geissenhainer, 3 Bradf. (N. Y.) 64; Mann v. Mann, 1 Johns. Ch. (N. Y.) 234; Ralston v. Telfair, 2 Dev. Eq. (N. C.) 55; Patterson v. Wilson, 101 N. C. 594, 8 S. E. R. 841; Field v. Eaton, 1 Dev. Eq. (N. C.) 283; Wor-

man v. Teagarden, 2 Ohio St. 380; Starling v. Price, 16 Ohio St. 29; McKay v. Hugus, 6 Watts (Pa.), 345; Comfort v. Mather, 2 W. & S. (Pa.) 450; Miller v. Springer, 70 Pa. St. 269; Kelly v. Kelly, 25 Pa. St. 460; Tompkins v. Merriman, 26 Atl. R. 659, 155 Pa. St. 440, 32 W. N. C. 364; Clarke v. Clarke (S. C.), 24 S. E. R. 202; Ganaway v. Tarpley, 1 Coldw. (Tenn.) 572; Pett v. Railroad Co. (Tex., 1888), 8 S. W. R. 203; Coffin v. Elliott, 9 Rich. Eq. (S. C.) 244; Durant v. Ashmore, 2 Rich. Eq. (S. C.) 184; Puller v. Puller, 3 Rand. (Va.) 83; Nomse v. Finch, 1 Ves. Jr. 358; Cambridge v. Rous, 8 Ves. 12; Bengough v. Walker, 15 Ves. 514; Herbert v. Reid, 16 Ves. 484, 485, 489; Attorney-General v. Grote, 3 Mer. 316; Maybank v. Brooks, 1 Bro. C. C. 84; Doe v. Kett, 4 T. R. 601; Lord Lansdowne's Case, 10 Mod. 98; Cole v. Rawlinson, 1 Salk. 234; Bertie v. Lord Falkland, 1 Salk. 231; Lowfield v. Stoneham, 2 Str. 1261; Chamberlayne v. Chamberlayne, 3 Freem. 52; Towers v. Moor, 2 Vern. 98; Vernon's Case, 4 Rep. 4; Cheyney's Case, 5 Rep. 68b; Challoner v. Bowyer, 2 Leon. 70, 72; Bernasconi v. Atkinson, 10 Hare, 345; Goodtitle v. Southern, 1 M. & S. 299; Benson v. Wittam, 2 Sim. 493; Powys v. Mansfield, 3 My. & Cr. 359.

he was surrounded when he executed it or when he died and the will went into operation. The application of this rule is by no means confined to the judicial construction of wills. It applies to all sorts of legal instruments, and indeed to writings of all kinds, from the crudest script ever penned by an almost illiterate peasant to the wonderful intellectual productions of the genius of Bacon or Shakespear. The reader must know something of the circumstances and situation of the writer and of the history of his times. He must be able, at least to a limited extent, to place himself in the position of the writer. The court construing a will must ascertain the intention by a perusal of the written language of the instrument, though in doing so it is not compelled either to close its eyes to the circumstances under which it was written, or to turn a deaf ear to parol evidence of the testator's position and the condition and situation of his property. The court has a right to demand all the light which is available and to require to be furnished with all the material information which is obtainable. In the great majority of cases the difficulty in understanding the will, which necessitates its construction, arises only upon a reference to extrinsic circumstances. So much the more reason, then, that there should be a full revelation of all these facts and circumstances, whether the purpose be to identify the beneficiary or the subject-matter, or to determine the testamentary capacity of the testator. Thus, in that very numerous class of cases where it appears necessarily by parol evidence that there is no person precisely answering to the name or to the description of some legatee named in the will, or that at his death the testator owned no property precisely corresponding to property devised, parol evidence is admitted to show the circumstances of the testator, and it may then be ascertained whom the testator meant or to what property he referred.¹

¹ Elyton Land Co. v. McElrath, 3 Shinn, 44 N. E. R. 495, 162 Ill. 124; C. C. A. 649, 53 Fed. R. 763, 2 U. S. Richards v. Miller, 62 Ill. 417; Lorieux App. 584; Brainerd v. Cowdrey, 16 v. Keller, 5 Iowa, 196; Chambers v. Conn. 10; Bond's Appeal, 31 Conn. Watson, 60 Iowa, 339, 14 N. W. R. 90; Billingslea v. Moore, 14 Ga. 370; 336; Donohue v. Donohue, 54 Kan. White v. Holland, 92 Ga. 216, 18 S. E. 136, 139, 37 Pac. R. 998; Ernst v. R. 817; Hawke v. Chicago R. R. Co. Foster (Kan., 1897), 49 Pac. R. 527; (Ill., 1897), 46 N. E. R. 240; Lomax v. Allen v. Van Meter, 1 Met. (Ky.) 264;

§ 910. Patent and latent ambiguities defined — The admissibility of parol evidence to explain latent ambiguities. The competency of parol evidence to explain latent ambiguities in the construction of wills is admitted. A latent ambiguity, says Lord Bacon, is "that which seems certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter, outside of the deed, that breedeth the ambiguity."¹ A patent ambiguity is one "that appeareth to be ambiguous upon the face of the deed or instrument." In *every* case the court is entitled to be placed in possession of all the information which is available of the circumstances of the estate and family of the testator when he made his will, to the end that the court may be in his situation as nearly as may be, and may interpret and understand the will as he would if he were living.² When the evidence of extrinsic circumstances is all in, it may appear that a description in the will which was intended by the testator to apply to *one object or thing* is applicable, with more or less certainty, to *several objects or things*. This is a case of latent ambiguity, and parol evidence is then received to ascertain which person or thing was intended by the testator. Where the ambiguity is latent, it is created by evidence of extrinsic facts, and the same evidence is admissible to remove it. But such evidence is not direct evidence of intention, and, if the rule in relation to the

Smith v. Holden, 58 Kan. 535; Darnall v. Adams, 13 B. Mon. (Ky.) 273; Lamb v. Lamb, 11 Pick. (Mass.) 375; Brown v. Saltonstall, 3 Met. (Mass.) 426; Brown v. Thorndike, 15 Pick. (Mass.) 400; Waters v. Howard, 1 Md. Ch. 112; McHugh v. Fitzgerald, 103 Mich. 21; Gilliam v. Chancellor, 43 Miss. 437; Gregory v. Cowgill, 19 Mo. 415; Mersman v. Mersman, 136 Mo. 244, 258; Little v. Giles, 25 Neb. 313, 41 N. W. R. 186; Goodhue v. Clark, 37 N. H. 525; Morgan v. Dodge, 44 N. H. 255; Van Winkle v. Van Houten, 3 N. J. Eq. 172; Halsted v. Meeker, 18 N. J. Eq. 136; Paxson v. Potts, 3 N. J. Eq. 136; Dey v. Dey, 19 N. J. Eq. 137; Barnard v. Barlow, 50 N. J. Eq. 131; Morris v. Sickie, 133 N. Y.

456, 31 N. E. R. 332; White v. Hicks, 33 N. Y. 383; Terpenning v. Skinner, 30 Barb. (N. Y.) 373; Doe v. Provost, 4 Johns. (N. Y.) 61; Gannaway v. Tarpley, 1 Coldw. (Tenn.) 572; Wootton v. Redd, 12 Gratt. (Va.) 196, 205, 207; Jones v. Quattlebaum, 31 S. C. 606, 9 S. E. R. 982; Cogdell v. Cogdell, 3 Des. (S. C., 1811), 346, 364; In re Gilmore's Estate, 154 Pa. St. 523, 26 Atl. R. 614; Westhoff v. Dracourt, 3 Watts (Pa.), 240.

¹ Bacon's Maxims, Reg. 23. "*Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.*"

² See *ante*, § 909.

reception of parol evidence to solve latent ambiguities permitted the introduction of such evidence only, it would not require a separate discussion, as it would be synonymous with the rule that extrinsic facts are always admissible to explain the language of the will, regardless of the nature of the ambiguity, whether it be patent or latent. The principle goes much further than this. It is not to be confined to the admission of facts appertaining solely to the circumstances of the testator, and which merely tend to show the meaning of his words. Under it evidence showing or suggesting a direct inference of intention as to the things or objects disposed of in the will, including *the testator's declarations of intention uttered at the execution of the will*, and, according to some of the cases, *subsequently thereto*, are received to assist the court in disposing of the latent ambiguity, by showing which of several persons or things answering to the description was intended by the testator. Hence it will be seen that there may be, and usually is, an essential and radical difference between the evidence which raises or creates the latent ambiguity, *i. e.*, proof of extrinsic circumstances of the case, and the evidence which removes it or explains it, and which may be declarations of the intention of the testator as well as evidence of circumstances.¹

¹ *Vandiver v. Vandiver* (Ala., 1897), 22 S. R. 154; *Brewster v. McCall*, 15 Conn. 292; *Spencer v. Higgins*, 22 Conn. 521; *Rogers v. Rogers*, 78 Ga. 688, 3 S. E. R. 451; *Pinney v. Nevins*, 33 Atl. R. 591, 66 Conn. 141; *Whitcomb v. Rodman*, 156 Ill. 116, 122; *Decker v. Decker*, 121 Ill. 341, 12 N. E. R. 750; *Grimes v. Harmon*, 35 Ind. 246; *Groves v. Culp*, 132 Ind. 186, 187; *Skinner v. Harrison*, 116 Ind. 139, 18 N. E. R. 529; *Dennis v. Holsapple*, 47 N. E. R. 631, 632; *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674; *Covert v. Sebern*, 73 Iowa, 564, 567, 35 N. W. R. 636; *Daugherty v. Rogers*, 119 Ind. 254, 258; *Cruse v. Cunningham*, 79 Ind. 402, 405; *Black v. Richards*, 95 Ind. 184, 189; *Sturgis v. Ward*, 122 Ind. 134, 136; *Jackson v. Payne*, 2 Met. (Ky.) 570; *Cotton v. Southwick*, 66 Me. 360, 367; *Turner v. Hallowell*, 76 Me. 527, 531; *Stockley v. Gordon*, 8 Md. 486; *Stackpole v. Arnold*, 11 Mass. 29; *Morse v. Stearns*, 131 Mass. 389, 2 Am. Prob. R. 51; *Marshall v. Haney*, 4 Md. 498; *Love v. Buchanan*, 40 Miss. 758; *Halsted v. Meeker*, 18 N. J. Eq. 136 (1866); *Burnet v. Burnet*, 30 N. J. Eq. 395 (1879); *Griscom v. Evens*, 40 N. J. Law, 402, 1 Am. Prob. R. 133, 137; *Hyatt v. Pugsley*, 23 Barb. (N. Y.) 285; *Mann v. Mann*, 1 Johns. Ch. (N. Y.) 234; *Klock v. Stevens*, 45 N. Y. S. 603; *Bradhurst v. Field*, 32 N. E. R. 113, 135 N. Y. 564; *Worman v. Teagarden*, 2 Ohio St. 380; *Boggs v. Taylor*, 26 Ohio St. 604; *Moreland v. Brady*, 8 Oreg. 303; *Senger v. Senger's Ex'r*, 81 Va. 694-697; *Hawkins v. Garland*, 76 Va. 149, 3 Am. Pro. R. 550; *Morgan v. Burrows*, 45 Wis. 211, 217,

It is not necessary, in order that parol evidence may be received, that the description in the will shall apply *precisely and in every respect* to two or more persons or things. In some cases where the rule has been invoked, two persons of exactly the same name, or answering precisely to the same description, have claimed.¹ But the law requires only that the testamentary description shall apply to the several objects with legal certainty, so that the mind of the court is satisfied. The description, whether by name, locality or occupation, must be sufficient to fairly satisfy the court that the testator may have meant either of the several persons or things which are revealed by the extrinsic evidence. For if the description of the person or thing be, in the opinion of the judge construing the will, wholly inapplicable to the subject intended, or which is claimed to be intended, parol evidence is not received to show who or what the testator did intend. Thus, if a benefit is claimed by several persons, all answering the description of the will in one or more material particulars, though none of them answers to it perfectly and accurately in every particular, extrinsic evidence is received, including expressions of intention.² In these cases, which are extremely numerous, the description, so far as it accurately applies to *any* person, applies to all the claimants alike, and so far as it is inaccurate it applies to no

220; *Sherwood v. Sherwood*, 45 Wis. 357, 363; *Patch v. White*, 117 U. S. 217, 219; *Gilmer v. Stone*, 120 U. S. 586, 588; *Hannon v. Mountain*, 23 Fed. R. 5, 11.

¹*Jones v. Newman*, W. Bl. 60. The gift was to John Cluer, of Calcot, and two persons answering *exactly to the name and description*, father and son, claimed the legacy. A similar case was that of a devise to "W. R., my farming man," and the testator had two men on his farm of that name. *Reynolds v. Whelan*, 16 L. J. Ch. 434. In *Doe d. Allen v. Allen*, 12 Ad. & E. 451, where the devise was to "John A., grandson of my brother Thomas," the declarations of the testator were admitted to show which grandson was intended, though made long subsequent to the will, where

the brother had two grandsons by the name of John. So in *Lord Cheyney's Case*, 5 Rep. 68, b, it was held that if a man, having had two sons named John, and believing that the elder of the two is dead, made a devise to "his son John," the younger son may show his father's knowledge of the death of the other by his declarations, and his meaning to give the land devised to himself.

²Thus, in *Careless v. Careless*, 1 Mer. 384, where the devise was to "Robert Careless, my nephew, son of Joseph Careless," and the testator had no brother Joseph, but he had two brothers John and Thomas, both mentioned in the will, each of whom had a son named Robert, parol evidence of extrinsic facts and declarations of intention was received.

one. Under this class of cases may be ranged those of the misnomer of a charitable corporation.¹

§ 911. **The admissibility of parol evidence to identify the subject-matter of a legacy or devise.**—The testator, in describing the property of which he disposes in his will, must, of necessity, employ terms which suggest or imply an existing condition of affairs. The words of his will always *suggest facts and circumstances which are extrinsic to it*, and things that are not, and cannot be, identified by anything contained in it.² If he describes his property somewhat vaguely or generally, parol evidence is necessary, not to contradict the meaning of the words, to add to or to overcome his express intention, but to confirm and elucidate that intention by showing what the words mean. Thus, in the common case of a devise of a “house,”³ or of a “farm,”⁴ or of land of any sort described as “*now occupied*” by the testator,⁵ or a devise of my “homestead,” “home place,” or home farm,”⁶ or a devise of land

¹ *Ante*, § 831. The leading English case upon the question of the admissibility of the declarations of the testator in cases of latent ambiguities is that of *Doe d. Hiscocks v. Hiscocks*, 5 Mees. & Wel. 363, decided in 1839. The devise was “to the grandson of the testator, John H., eldest son of John H.” Prior to the execution of the will John H. had twice married. By his first wife he had one son named Simon. By his second wife he had an eldest son John H. and other children. The court, in rejecting parol evidence of instructions given by the testator to the draughtsman and his declarations of intention after execution to show which of these two the testator meant, said: “There is but one case in which the testator’s declarations as evidence of intent can properly be admitted, and that is where the meaning of the testator’s words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but from some of the circumstances admitted in proof an ambiguity

arises as to which of the two or more things or persons, each answering the words in the will, the testator intended to express. Though it was clear he meant one only, both were equally denoted by the words, when there arose an ‘equivocation,’ and evidence of previous intention might be received to solve this latent ambiguity, for the intention showed what he meant to do: and when you knew that, you immediately perceived he had done it by the words he had used, and which, in their ordinary sense, might bear that construction.”

² *Ante*, § 909.

³ *Ante*, § 302.

⁴ *Ante*, § 303.

⁵ *Ante*, § 305; *Jackson v. Sill*, 11 Johns. (N. Y.) 201, 202; *Brown v. Saltonstall*, 3 Met. (Mass.) 423, 427; *Thomson v. Thomson*, 115 Mo. 56, 21 S. W. R. 1085, 1128; *Horton v. Lee*, 99 N. C. 227, 5 S. E. R. 404.

⁶ *Goodtitle v. Radford* (1813). 1 Mee. & Wel. 299. See cases fully cited *ante*, § 304.

which the testator states he purchased of A. or which he received from his father by will,¹ it cannot be known, where the description is so indefinite and vague, what property passes, until it shall be ascertained by parol what house, farm or homestead was occupied or owned by the testator when he made his will, or what land he purchased, or received under the will of his father.

Again, in disposing of his personal estate the testator may bequeath to A. "his money,"² or "his furniture,"³ or his "stock on a farm,"⁴ or "the plate at his banker's,"⁵ and no one can tell what personal property passes until the condition of the personal estate of the testator is ascertained by parol evidence.

All these terms are uncertain and fluctuating in their meaning, according to the circumstances of each case and the situation of the person employing them. Each may mean much or little. And though where the testator has employed ordinary words it will be presumed that he has used them in their strict primary sense, and parol evidence will not be received to show that he has used them in another sense, or to extend their meaning where the testator has used broad and vague words, parol evidence is competent to enable the court to ascertain how much or how little the testator included under these general terms. This apparent exception to the rule which excludes parol evidence is usually formulated by the decisions under the principle that parol evidence is admissible to identify the subject-matter of a devise or legacy. And not only are the circumstances of the property of the testator received in evidence for this purpose, but his declarations, whether uttered prior or subsequent to the execution of the will, are received where they show or tend to show his habitual use during life of the terms employed in his will to designate the property in question.⁶

¹ Baker's Appeal, 115 Pa. St. 590, 8 Atl. R. 630; Ogsbury v. Ogsbury, 115 N. Y. 290.

² § 312.

³ § 314.

⁴ § 315.

⁵ § 316.

⁶ Flannery v. Hightower (Ga., 1898), 25 S. E. R. 371; Swift v. Lee, 65 Ill.

836; Groves v. Culp, 132 Ind. 186, 31 N. E. R. 569; Hartwig v. Schriefer (Ind., 1898), 42 N. E. R. 471; Stewart v. Stewart, 96 Iowa, 620, 627; Eckford v. Eckford, 91 Iowa, 54, 58 N. W. R. 1093; Chambers v. Chambers, 69 Iowa, 339, 14 N. W. R. 336; Severson v. Severson, 68 Iowa, 656; Willett v. Carroll, 13 Md. 459; Warner v.

Parol evidence is always admissible if offered for the purpose of identifying the objects or monuments to which the testator has referred in describing the boundaries of the land which he has devised. If he gives a farm, which is described as bounded by a road or a stream, or by a line running along the middle of a ditch from one post to another post, or from a heap of stones; or if he describes the land as bounded by the land of A., or employs similar terms applicable to the boundaries of the land, the gift will fail, unless extrinsic evidence is received to identify the natural and artificial objects which are mentioned. The locality of the monuments mentioned is only to be learned from the testimony of persons who are familiar with them.¹

Parol evidence is received necessarily to show what property is included in a vague description, but never to add to or to contradict a description which, though vague and general, is plain and intelligible. Thus, while it may be shown by parol what property the testator meant to include under a devise of *a house or farm now occupied by him*, it cannot be shown by parol that the testator, when he gave land described as occupied by him, intended to include land *occupied by others, though owned by the testator*.² Nor can it be shown, where he expressly excepts land sold or leased from a devise, that he did not mean to except land which was under lease at the date of the will,³ or that when he gives all his land he meant to devise a part and not the whole. Hence, while parol evidence is receivable to explain the terms of a description and to identify what property may come under it, evidence is not receivable

Miltenberger, 21 Md. 264; Frick v. Frick, 82 Md. 218, 33 Atl. R. 462; Riggs v. Myers, 20 Mo. 239; Creasy v. Alverson, 43 Mo. 13; Seebrook v. Fedawa, 33 Neb. 413; Hawkins v. Young, 52 N. J. Eq. 508, 28 Atl. R. 511; Ryders v. Wheeler, 22 Wend. (N. Y.) 148; Pritchard v. Hicks, 1 Paige (N. Y.), 270; Grubb v. Foust, 99 N. C. 286, 6 S. E. R. 103; Ashworth v. Ashworth, 12 Ohio St. 381; McKeough v. McKeough (Vt., 1897), 37 Atl. R. 275. Parol evidence is admissible to show that a bond which is described in the will as "my bond

for, etc., to A." was a bond which was made to B. and merely delivered to A. as the agent of B. Smith v. Wyckoff, 3 Sandf. Ch. (N. Y.) 77; Scott v. Neeves, 77 Wis. 305, 45 N. W. R. 421.

¹ Nichols v. Lewis, 15 Conn. 137; Storer v. Freeman, 6 Mass. 440; Brownfield v. Brownfield, 20 Pa. St. 55.

² Brown v. Saltonstall, 3 Met. (Mass.) 426; Bethea v. Bethea, 1 Hill (S. C.), 64.

³ Chase v. Stockett, 72 Md. 235, 19 Atl. R. 761.

either for the purpose of broadening or narrowing a description under the guise of explaining it. So when the testator devises land purchased from or occupied by A., it is not competent to show that he meant to include land not purchased from or not occupied by A. To receive parol evidence for such a purpose would be equivalent to inserting a devise of the land in the will. And where the description of the property devised is so vague and indefinite that its identification is impossible, parol evidence will not be received to show what the testator intended to give. Thus, where the testator devised a "small farm in Wayne county, near the Missouri line," and owned no land at all in Wayne county except a small tract which was connected with a larger farm situated in another county, the court held that parol evidence should not be received to show that the small farm alluded to was the one in the other county, or to show that the two were connected.¹

§ 912. Parol evidence to show mistakes and supply omissions.—The power of a court of equity to correct mistakes, transpose words or clauses or supply words omitted, where the necessity for it is apparent upon the face of the will, is admitted.² If it is apparent *from the context that a word or a clause has been omitted from the will it may be supplied.* But parol evidence is never receivable to supply single words or clauses where the omission is *not apparent on a reading of the will.* Thus, it cannot be shown by parol that the testator stated that he would give or had given a legacy to a person whose name is not mentioned,³ or that the draughtsman of the will had forgotten to insert a legacy which the testator meant to give;⁴ nor can the amount of a legacy precisely stated be increased or diminished by parol evidence, no matter how clear and convincing such evidence may be.

Where a testator has expressed an intention to give a legacy to some person, but has left the legatee's name blank, as a legacy to "Lady —,"⁵ or the amount blank, or where he ap-

¹ Christy v. Badger, 72 Iowa, 581, 34 N. W. R. 427.

² See *ante*, §§ 356-368.

³ Comstock v. Hadlyme, 8 Conn. 254.

⁴ Andress v. Weller, 3 N. J. Eq. 604. And see Brown v. Selwyn, Ca. Temp. Tal. 240.

⁵ Hunt v. Hort, 3 Bro. C. C. 311. See also Everett v. Carr, 57 Me. 325, 331; Lefevre v. Lefevre, 59 N. Y. 434, 440; Baylis v. Attorney-General, 2 Atk. 239; Ulrich v. Litchfield, 2 Atk. 372, 374; Taylor v. Richardson, 2 Drew. 16.

points an executor, but omits to name him,¹ or where he has omitted to state that a legacy is upon condition, or is given in lieu of dower,² or to satisfy some other claim which the legatee has against the testator, parol evidence is not received to supply the omission.³ For under the rule that parol evidence cannot be employed to vary or add to a will, it is incompetent to show by the declarations of the testator or other extrinsic evidence that the testator has by his own mistake or that of some other person given a legacy of less value or of a different character from that which he in fact actually meant to give.⁴ Thus, where a testator owned land in A. county and also in B. county, both of which he intended to devise to his wife, but, as was conclusively proved, the description of the land in B. was inadvertently stricken out in copying the will, parol evidence was rejected, though it appeared that the final copy of the will had never been read to the testator, and that the original draft in his own hand included the property in B. county.⁵ In another case £10,000 was directed to be *divided equally* between A. and B. The draughtsman drew *two* clauses, in each of which, by his mistake, £10,000 was given to A. The name of B. was wholly omitted from the draft and also from the engrossment, and the will was executed with the mistake uncorrected. The

¹ *Everett v. Carr*, 57 Me. 325, 332; *Winne v. Littleton*, 2 Ch. Ca. 51.

² *Ante*, § 734.

³ Equity has no power to reform a will or to receive parol evidence to make a will speak a different language than that inserted by the testator, merely on proof that the testator, or some one to whom he delegated the task of drawing the will, has inserted or omitted something by mistake. The mistake or the omission must be apparent upon the face of the will. Otherwise there can be no relief in equity. *Campbell v. Campbell*, 138 Ill. 612, 28 N. E. R. 1080; *Bingel v. Volz*, 142 Ill. 214, 31 N. E. R. 13; *Worrell v. Patton*, 69 Ill. 254; *Judy v. Gilbert*, 77 Ind. 96, 99; *Cruse v. Cunningham*, 79 Ind. 402, 405; *Funk v. Davis*, 103 Ind. 573, 574; *Sturgis v. Work*, 122 Ind. 134, 135; *Johnson v.*

Johnson, 128 Ind. 93, 27 N. E. R. 340; *Sherwood v. Sherwood*, 46 Wis. 357, 361; *Thomson v. Thomson*, 115 Mo. 56, 21 S. W. R. 1085, 1128; *In re Swinburne*, 16 R. L. 208, 14 Atl. R. 850.

⁴ If a testator employ another to convey his intention in a will in technical language, and that other, *aside from any question of fraud*, makes a mistake in doing so, the mistake is the mistake of the employer, and the language will operate as if it had been chosen by the testator. *Collins v. Elstone*, 1 Rep. 458. (1893) Prob. 1.

⁵ *Newburgh v. Newburgh*, 5 Mad. 364, 1 M. & Sc. 352. See also the case of *Langston v. Langston*, 8 Bligh (N. S.), 167, where two lines of a material provision were omitted in the final copy of the will. *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674, 676-686.

name of A. was stricken out of one of the clauses by the court, as the error *was apparent upon the face of the will*. But the name of B. could not be inserted on parol evidence to give him a legacy not given by the will.¹ So where a fund was to be divided "among nephews and nieces A. and B. —," the gift was void though the testator, after mentioning nephews and nieces in the plural, named only one of each class. He left a blank for the purpose of inserting names, but as he never did this, the names cannot be supplied by parol.²

§ 913. Parol evidence to explain the meaning of words.—A testator is, *prima facie*, presumed to have employed the words in which he has expressed his intention in *their strict and primary sense*. If, therefore, nothing appears in the context which shows that he has used them in another sense, and *always provided that they possess a sensible meaning when referred to extrinsic circumstances*, parol evidence is not received to show that the testator has used them in some other sense. This rule applies to technical words. Unless it shall appear from the context that the testator has used technical words in a non-technical sense, or unless, when viewed in the light of the surrounding circumstances, the technical words have no meaning, parol evidence is not received to correct or contradict their ordinary meaning, and to show that the testator has used them with a secondary meaning.³

¹ *In re Goods of Boehm*, (1891) Prob. 247.

² *Greig v. Martin*, 5 Jur. 329, 330.

³ *Johnson v. Johnson*, 32 Ala. 637; *Appeal of Allen*, 69 Conn. 702, 38 Atl. R. 701, 702; *Ruggles v. Randall* (Conn., 1897), 38 Atl. R. 885, 887; *Jackson v. Alsop*, 34 Atl. R. 1106, 67 Conn. 249; *Willis v. Jenkins*, 30 Ga. 169; *Daugherty v. Rogers*, 119 Ind. 254, 260; *Ridgeway v. Lanphear*, 99 Ind. 251, 252; *West v. Rassman*, 135 Ind. 278, 290; *Wheeler v. Dunlap*, 13 B. Mon. (Ky.) 292; *Osgood v. Lovering*, 33 Me. 464, 469; *Golder v. Chandler*, 87 Me. 63, 32 Atl. R. 784; *Crocker v. Crocker*, 11 Pick. (Mass.) 252; *McQueen v. Lilley*, 131 Mo. 9, 17; *Love v. Buchanan*, 40 Miss. 748; *Marshall's*

Ex'rs v. Hadley, 50 N. J. Eq. 547, 25 Atl. R. 325; *Lasher v. Lasher*, 13 Barb. (N. Y.) 106, 109, 110; *Gardner v. Heyer*, 2 Paige (N. Y.), 1; *Tuttle v. Berryman*, 94 Ky. 553, 23 S. W. R. 345; *Van Nostrand v. Moore*, 52 N. Y. 12, 18; *Rivenett v. Bourquin*, 53 Mich. 10; *Porter v. Porter*, 50 Mich. 456; *Rupp v. Eberly*, 79 Pa. St. 141, 145; *France's Estate*, 75 Pa. St. 220, 225; *Harrison v. Morton*, 2 Swan (Tenn.), 251, 261; *Smith v. Bell*, 6 Peters (U. S.), 68; *Given v. Hilton*, 95 U. S. 591; *Hamilton v. Ritchie*, (1894) App. Cases, 310; *Mounsey v. Blamire*, 4 Russ. 484; *Shore v. Wilson*, 9 Cl. & Fin. 558; *Barrow v. Methold*, 1 Jur. (N. S.) 194; *Crosley v. Clare*, 3 Sw. 320; *Brown v. Brown*, 11 East, 441;

Thus, it is settled that, where the testator devises his real property to his *heirs*,¹ or his personal property to his *next of kin*, or to *children, grandchildren* or other classes of relations, parol evidence is not to be received to show an intention on his part to include in the classes mentioned any person who does not properly belong there.² By parol evidence is here meant direct evidence of the intention of the testator, consisting of his declarations introduced for the sole purpose of contradicting the plain meaning of the words of his will. Thus, parol evidence of the language of the testator is not admissible to show that he has declared that his grandchild should take under a gift to children as a class;³ that a stepchild should take under such a devise,⁴ or that a nephew of his wife should take under a gift to his own nephews.⁵ But the condition of the testator's family would be relevant and may be proved by parol in the first example to show that he had *no* living children when he made the will, but that he had adopted a grandchild as his own, or that a stepchild was commonly treated as a child by him, and, in the last instance, that his wife's nephew lived with him and that he treated him as his nephew, and that he never had any nephews by consanguinity.

So the meaning of peculiar words which are not in general use, or which are commonly employed in the profession or business to which the testator belongs, may be explained by parol. Thus, where the testator, being a sculptor, bequeathed his "mods." to A., the evidence of other sculptors was received to show the custom of the profession, though the declarations of the testator were rejected.⁶ So, also, if the testator employed abbreviations in his will,⁷ as when he was a jeweler and employed his private price mark to indicate the amount of the legacies,⁸ or where he uses words which have a peculiar signification in the particular place where he dwells, as where he speaks of "his farm" or "homestead," parol proof of the fact of such usage, with explanatory evidence of what the abbrevia-

Phillips v. Chamberlaine, 4 Ves. 50, 57; Andrews v. Schoppe, 84 Wis. 170, 175, 24 Atl. R. 805.

¹ § 608.

² *Ante*, §§ 549, 572, 585, 591, 595, 597.

³ *Ante*, §§ 546, 548.

⁴ § 549.

⁵ § 595.

⁶ Goblet v. Beachey, 8 Sim. 24.

⁷ Dana v. Fidler, 12 N. Y. 40, 46.

⁸ Kell v. Charmer, 23 Beav. 195; Masters v. Masters, 1 P. W. 421.

tions, private marks or peculiar words meant, will be received.¹ So, also, parol evidence is received for the purpose of showing who was meant by the testator where he has employed a pet name in his will to describe a beneficiary.² In all these cases this evidence is competent, not to show directly the person or thing that the testator intended in this particular case, but to illustrate his habitual modes of speech and thought, leaving the court from these circumstances to ascertain his intention.³

¹ *Scott v. Neeves*, 77 Wis. 305, 311; *Oades v. Marsh* (Mich., 1897), 69 N. W. R. 251; *Schlottman v. Hoffman* (Miss., 1896), 18 S. R. 893; *Ryers v. Wheeler*, 22 Wend. (N. Y.) 152, 248; *Waugh v. Waugh*, 28 N. Y. 9; *Boggs v. Taylor*, 26 Ohio St. 516; *Hart v. Marks*, 4 Brad. (N. Y.) 163.

² *Clayton v. Lord Nugent*, 13 Mee. & Welsby, 200, 207; *Price v. Page*, 4 Ves. 679.

³ An example of this occurred in *Lee v. Pain*, 4 Hare, 251. The testator gave legacies to "Mrs. and Miss Bowden, widow and daughter of the late Mr. Bowden." It appeared that two persons named Mrs. and Miss Washbourne, the widow and daughter of a Mr. Washbourne, were entitled to these legacies, and that the testator was in the habit of calling these ladies Bowden for the reason that he had been intimately acquainted with the father of Mrs. W., whose name was Bowden. The following remarks of Lord Abinger, uttered in determining the case of *Doe d. Hiscocks v. Hiscocks*, 5 Mee. & Wel. 363, 367, have been often quoted as a most lucid summary and explanation of the doctrine of the application of parol evidence to the construction of wills: "The object in all cases is to discover the intention of the testator. The first and most obvious mode of doing this is to read his will as he has written it, and collect his intention from his words. But as his words refer to facts and circumstances respecting his prop-

erty and his family, and others whom he names or describes in his will, it is evident that the meaning and application of his words cannot be ascertained without evidence of all those facts and circumstances. To understand the meaning of any writer we must first be apprised of the persons and circumstances that are the objects of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustration to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances, therefore, respecting persons or property to which the will relates are undoubtedly legitimate and often necessary evidence, to enable us to understand the meaning and application of his words. Again, the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly called. If these names should occur in his will they could only be explained and construed by the aid of evidence to show the sense in which he used them, in like manner as if his will was written in cipher or in a foreign language. The habits of the testator in these particulars must be received as evidence to explain the meaning of his will. But there is another mode of obtaining the intention of the testator, which is by evidence of his declarations of the instructions given for his will, and other circumstances of the like nature which are

§ 914. The uncertainty of terms descriptive of real property.— Uncertainty as to the subject-matter frequently arises in devises of real property. *First.* Either because the description of the land in the will does not precisely correspond with

not adduced for explaining the words or meaning of the will, but either to supply some deficiency or to remove some obscurity, or to give effect to expressions that are unmeaning or ambiguous. Now there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is, on the face of it, perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words of the will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used, in that case there is what Lord Bacon calls 'an equivocation,' that is, the words equally apply to either manor; and evidence of previous intention may be received to solve this latent ambiguity, for the intention shows what he meant to do, and when you know that you immediately perceive that he has done it, by the general words which he has used, which in their ordinary sense may properly bear that construction. It appears to us that in all other cases parol evidence of what was the testator's intention ought to be excluded upon this plain ground, that his will ought to be made in writing, and if his intention cannot be made to appear by the writing explained by circumstances, there is no will."

"I. A testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptation, unless, from the context of the will, it appears that he used them in a different sense, in which case the sense in which he thus appears to have used them will be the sense in which they are to be construed. II. Where there is nothing in the context of the will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where the words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation; and although the most conclusive evidence of the intention to use them in such popular or secondary sense may be tendered. III. Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words so interpreted are insensible with reference to extrinsic circumstances, a court of law may look into the extrinsic circumstances of the case to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable. IV. Where the characters in which a will is written are difficult to be deciphered, or the language of the will is not understood

the description of *any land* which is owned by the testator, or *second*, because the description of the land in the will is so vague and general that the court cannot tell what is meant. An example of the first class would occur where the testator owns a lot in section 60, and devises "my lot in section 59;"¹ or where he devises a farm in A. county, and the only farm he owns is one in B. county. In the second class of cases the description is so vague that it is difficult, if not impossible, to know how much land the testator meant to include under the term he has employed. Thus, where he devises "my estate at A.," "the premises located in B.," or his "farm," "house," "plantation" or "homestead," it is impossible to tell, without the employment of parol evidence, what outlying tracts and buildings appurtenant thereto he meant to include. A devise of land will not be held void for uncertainty if the language

by the court, the evidence of persons skilled in deciphering writing, or who understand the language in which the will is written, is admissible to declare what the characters are, or to inform the court of the proper meaning of the words. V. For the purpose of determining the object of the testator's bounty, or the subject of disposition or the quantity of interest intended to be given by his will, a court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given in the will. The same (it is conceived) is true of every other disputed point respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be ancillary to the right interpretation of a testator's words. VI. Where the words of a will, aided by evidence of the material facts of the case, are in-

sufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended, and the will (except in certain special cases—see Proposition VII) will be void for uncertainty. VII. Notwithstanding the rule of law which makes a will void for uncertainty where the words, aided by evidence of the material facts of the case, are insufficient to determine the testator's meaning, courts of law, in certain special cases, admit evidence of intention to make certain the person or thing intended, where the description in the will is insufficient for the purpose. These cases may be thus defined: Where the object of a testator's bounty, or the subject of disposition (*i. e.*, the person or thing intended), is described in terms which are applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things so described was intended by the testator." Wigram on Wills, p. 55.

¹Priest v. Lackey, 140 Ind. 399, 39 N. E. R. 54; Winkley v. Kaime, 32 N. H. 268.

of the will, though describing it vaguely or incorrectly, is sufficient, *with parol evidence*, to identify the land devised, and to show the intention of the testator. That part of the description which is erroneous will be rejected, and the devise will be valid if, from that which is correct, it can be ascertained what piece or lot was meant to be given.¹

¹Bishop v. Morgan, 82 Ill. 351; Groves v. Culp, 132 Ind. 186, 31 N. E. R. 569; Hunt v. Braintree, 12 Met. (Mass.) 127; Denfield v. Smith, 156 Mass. 265; Bridge v. Bridge, 146 Mass. 293, 15 N. E. R. 809; Otis v. Smith, 9 Pick. (Mass.) 293; Brown v. Turner, 113 Mo. 27, 20 S. W. R. 661; Seebrook v. Fedawa, 33 Neb. 413, 50 N. W. R. 270; Bellows v. Copp, 20 N. H. 492; Uppington v. Pooler, 19 N. Y. S. 48, 428; Bear v. Bear, 13 Pa. St. 529; Hart v. Stoyer, 164 Pa. St. 523, 30 Atl. R. 497; Best v. Hammond, 55 Pa. St. 509; Jones v. Quattlebam, 31 S. C. 606, 9 S. E. R. 982; Blackmer's Estate, 66 Vt. 46, 28 Atl. R. 419; In re Ehle's Will, 73 Wis. 445, 48 N. W. R. 627; Finelite v. Smith, 124 N. Y. 693. See also for fuller citations the notes to *ante*, §§ 295-306. In a case which arose in England, where the testator devised the "house in Seymour Place, which I have given a memorandum to purchase (and which is to be paid for out of timber which I have ordered to be cut), to the Rev. John Sanford," it was objected to the devise that the will did not specify what particular timber was to be cut, and that the devise was for that reason void for uncertainty. But the court held otherwise, admitting parol evidence to show that the testator had, a few days after contracting for the purchase of the house, given orders to have timber to the value of

£10,000 cut down on his estate. The direction to pay for the house out of the proceeds of timber to be cut amounts, in effect, to a devise of the proceeds of the timber, and it is necessary to ascertain how much timber was to be cut. This may be done by parol, and the moment that it is done and the court is put in possession of this information, the subject of the devise is ascertained as clearly as though the number, value or situation of the trees had been inserted in the will itself. The remarks of the master of the rolls made in this case are well worthy of attention. Sanford v. Raikes, 1 Merivale, 646. In the case of Ricketts v. Turquand, 1 H. L. Cases, 472, parol evidence was admitted to show what the testator had intended to include under the term "my estate, called Ashford Hall." In distinguishing this case from Doe v. Oxenden, the court, by Lord Cottenham, said: "If a testator describes lands in a particular parish, or in a particular locality, you cannot go into parol evidence to show by such a particular description that he meant land out of it. You cannot do that without contradicting the terms used. Here is a term which includes more or less land, according to what was meant by the term used, and all we are in search of is the particular meaning of the term used."

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